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KenMor Electric Company, Inc. and H & J Electric Co. and Louis P. Lee d/b/a L.L. Electric Co. and Independent Electrical Contractors of Houston, Inc. and International Brotherhood of Electrical Workers Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL—CIO. Cases 16—CA—17895, 16—CA—18613, 16—CA—18595, 16—CA—18302—2, 16—CA—18530—3, 16—CA—18595—2, 16—CA—18600—3, and 16—CA—18613—2

August 27, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On September 29, 1998, Administrative Law Judge Howard I. Grossman issued the attached decision¹ finding that Respondent Independent Electrical Contractors of Houston, Inc. (IEC) violated Section 8(a)(3) and (1) of the Act by maintaining a discriminatory "referral system," and that Respondents KenMor Electric Company, Inc., H & J Electric Co., and Louis P. Lee d/b/a L.L. Electric Co. (collectively, the Respondent Employers) violated Section 8(a)(3) and (1) by refusing to hire the alleged discriminatees,² or consider them for hire, based on their union activity or affiliation.³ The Respondents each filed exceptions and supporting briefs.⁴ The General Counsel and the Charging Party each filed answering briefs.

On June 13, 2000, the Board remanded this proceeding for further consideration in light of *FES*, 331 NLRB 9

(2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

On March 21, 2001, the judge issued the attached supplemental decision affirming the findings, conclusions, and recommended Order in the original decision. The Respondents each filed exceptions and supporting briefs. The General Counsel filed an answering brief and the Respondents each filed reply briefs.⁵

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions for the reasons set forth below and to adopt his recommended Order as modified and set forth in full below.

Respondent IEC filed a response opposing the Union's motion, except with respect to the common complaint allegations against it in both cases which, IEC argues, should be consolidated. Accordingly, in a motion to sever, IEC requests that the complaint allegations against it in the instant proceeding (Cases 16–CA–18302–2, 16–CA–18530–3, 16–CA–18595–2, 16–CA–18600–3, and 16–CA–18613–2), be severed from the allegations against Respondents KenMor Electric, H & J Electric, and L.L. Electric (Cases 16–CA–17895, 16–CA–18613, and 16–CA–18995), and consolidated with *Independent Electrical Contractors of Houston*, 16–CA–18821–2, et al.

We deny both motions. First, the requests to consolidate are moot. Second, with respect to the Charging Party's request to solicit briefs to address the merits of *Toering Electric*, *Oil Capitol*, and *Contractor Services*, we have duly considered the request but are not prepared at this time—particularly in two cases that have been pending for so long—to deviate from the precedent set forth in those cases.

¹ On November 12, 1998, the judge issued an "Erratum" correcting inadvertent typographical errors.

² The alleged discriminatees are Ray Rath, Troy Lockwood, and John Gafford.

³ On February 1, 2007, the Board granted a joint Motion to Sever and Dismiss the Complaint in Cases 16–CA–18264 and 16–CA–18264–2 pursuant to a settlement agreement between the Charging Party Union and Respondent MH Technologies, Inc.

On September 11, 2009, the Board granted the Charging Party's Motion to Remand and Sever and Motion to Withdraw Charges in Case 16–CA–17894 involving Respondent Houston Stafford Electric, Inc., and in Case 16–CA–18530 involving Respondent Hou-Tex Power, Inc. The Board further granted Joint Motions of the Charging Party and the Respondents to dismiss the complaints in those cases.

Accordingly, the complaint allegations regarding MH Technologies, Houston Stafford Electric, and Hou-Tex Power are no longer before the Board.

⁴ Respondent KenMor Electric requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

⁵ On May 24, 2010, the Charging Party filed a Motion to Consolidate Cases and Solicit Briefs from Parties and Interested Amici on Issues raised by the Board's decisions in *Toering Electric*, 351 NLRB 225 (2007); *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007); and *Contractor Services*, 351 NLRB 33 (2007). Specifically, the Charging Party requests that this proceeding be consolidated with pending case *Independent Electrical Contractors of Houston*, Case 16–CA–18821–2, et al., and that the solicited briefs address whether *Toering Electric*, *Oil Capitol*, and *Contractor Services* should be applied in these cases.

We find no merit in the Respondents' allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondents in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). We also reject the Respondents' contentions that the judge was biased on the basis of his previous decisions

⁷ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁸ We shall modify the recommended Order and Notice to more closely conform to the violations found and in accord with *Ishikawa*

We find that IEC's application referral system, which the Respondent Employers used to recruit electricians, interfered with the right of job applicants who were union members and "salts" to be hired on an equal basis with other nonunion applicants. The application referral system, in its totality, therefore, violated Section 8(a)(1) of the Act. We also adopt the judge's findings that the Respondent Employers refused to hire the alleged individual discriminatees in violation of Section 8(a)(3) and (1). 10

I. THE IEC APPLICATION REFERRAL SYSTEM

A. Facts

IEC is the Greater Houston, Texas chapter of a national trade association of electrical contractors. ¹¹ Its membership consists mostly of local contractors, including the three Respondent Employers. None of the electrical contractors who constitute the membership of IEC was signatory to collective-bargaining agreements with any union during the period at issue.

In the early 1990s, and continuing through 1996 and 1997, the period relevant to this case, the Charging Party Union sponsored an ongoing "salting" campaign called COMET (Construction Organizing Membership Education Training), which it directed at nonunion contractors in the Houston area, including IEC members. ¹² This case arises out of that campaign.

IEC provides various services to its members, including a centralized employee application referral service

Gasket America, Inc., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). We shall issue separate notices and orders for each of the Respondent employers.

⁹ As explained below, we find it unnecessary to decide whether IEC's application referral system also violated Sec. 8(a)(3) or whether any of its individual components were unlawful.

The judge also concluded that the Respondents violated Sec. 8(a)(3) and (1) by refusing to consider the job applicants in question. As discussed below, we conclude that, under the *FES* framework, the evidence establishes a refusal-to-hire violation. It is therefore unnecessary to decide whether the Respondents also violated the Act by unlawfully refusing to consider the applicants because the remedy for such a violation would be subsumed within the broader remedy for the refusal-to-hire violation. See *FES*, 331 NLRB at 15. The judge's conclusions of law, recommended Order, and notice are modified accordingly.

¹¹ Although IEC is the name of the national parent association, for simplicity we use the acronym here to refer to the Houston chapter.

12 The features of a salting campaign are now familiar. Union electricians would apply to targeted contractors, directly or through the IEC application referral service, and would indicate on their applications that they were members of the Union and intended, if hired, to engage in organizing activities. On other occasions, salting applicants would apply without revealing their union affiliation. Most salts who were hired would discuss the Union with other employees and sometimes engage in other organizing activities.

and a "shared man" program, both described below. ¹³ All of the Respondent Employers used both services to some degree.

As part of its application referral service, IEC advertised for electricians, accepted job applications on behalf of its members, and transmitted applications or made them available to interested members. IEC sorted applications according to the experience level of the applicant (journeyman, apprentice, or inexperienced). An application filed with IEC would remain available for review by IEC's members for 30 days. Members could request that applications be faxed or mailed to them, or they could go to IEC's office to review and copy applications in person

To its members, IEC described this service, which began in 1990, as providing "easy access to employment for out-of-work electricians and available work force for contractor members." IEC member employers could use the application referral service as an exclusive source of job applicants or as a supplementary source.

By IEC's own estimate, the application referral service cost it from \$60,000 to \$100,000 a year to operate. However, IEC kept no records that would indicate which contractor-members used the application referral service, how often they did so, which applications were reviewed by which members, or how often IEC applicants were hired. In addition, IEC refused to tell applicants which of its members had reviewed their applications, and it did not permit applicants to review the applications they had submitted.

Until September 1997, no limit was imposed on the number of applications an applicant could file with IEC over any period of time. Because employers were known to give preference to the applications most recently filed, it was common for some applicants to file new applications with IEC every few days. On September 7, 1997, however, IEC adopted a new policy of imposing a \$50 fee for each additional application that an individual filed within a 30-day period. The only exception to the new fee requirement was for applicants who had been laid off by an IEC member within the previous 30 days. The number of applications the alleged discriminatees filed with IEC dropped sharply after the fee was imposed.

In addition to using the application referral service, IEC members could participate in its "shared man" program. Under this program, members who needed additional help could borrow employees from each other for up to 60 days. The borrowing employer was required to pay the borrowed employee the same wages and benefits

¹³ IEC also operates apprenticeship and continuing education programs for electricians, and lobbies Government agencies on issues of concern to its members.

as the employee received from the lending employer, even if those rates were higher than the borrowing employer paid its own employees. This intermember borrowing system enabled a lending employer to retain an employee rather than lay him off during a slow period, while enabling the borrowing contractor to obtain temporary help without having to hire a new employee.

IEC also published a periodic newsletter describing the functions and activities it performed for its Houston members. Articles in the newsletter conveyed IEC's and its national parent association's perspective on unions and, during the period at issue here, the Union's COMET campaign. The March 1994 IEC newsletter carried a front-page article by IEC National First Vice President (and former IEC Houston president) Jon Pollock, entitled, "IEC members can defeat COMET," and (on a continuing page) "IEC membership is key to success." In this article, Pollock warned members that advertising directly for their own job applicants in the newspapers "is equivalent to waving a red flag to the union" and would result in their hiring union members. He then emphasized that "[m]any IEC chapters advertise for electrician applications on behalf of [their] members," and that by use of this service "contractors can avoid some of the problems of hiring off the street." In addition, Pollock stated, "The Shared Man Program also allows members to loan employees to each other and minimize their exposure to risk." Pollock went on to observe:

Contractors are beginning to adopt hiring policies that favor previous employees or those referred by either the IEC or other chapter members. When a stranger shows up looking for work, we are not allowed to ask "are you here to work or are you here to destroy us?" Unknown workers may come with hidden motivations and questionable agendas.

Pollock also observed that "[a]nother unexpected result of COMET is the tremendous demand for IEC services."

Similarly, an article in the IEC newsletter of March 1996, entitled "Coping with Labor's COMET Campaign," opened by observing that nonunion contractors were "scrambling for strategies to counter new and accelerated union organizing attacks." The article went on to describe "a few developments designed to take some of the sting out of IBEW's potent anti-open shop bites. The most promising is a program started by the Greater Houston Chapter, IEC." (Emphasis added.) The article then quoted Bob Wilkinson, IEC Houston executive director, on "how his program deals with [the salting] problem." Wilkinson, like Pollock, noted that "IBEW locals in this area and many others monitor all ads and then send union members to apply." The article contin-

ued with a subheading emphasizing, "Chapter runs 'hiring hall' to help contractors avoid 'salting' risk," and stated:

To counter labor's attack on the open shop's skills' sources, the Houston Chapter and some other IEC affiliates have developed referral procedures. They advertise on behalf of their members and sign up applicants at various offices. [Emphasis added.]

Wilkinson then described the application referral service as follows:

Contractors who are short-handed can obtain a fax list of potential applications. They then select those who have the best credentials. *Aside from helping to avoid potential "salting" problems*, this process eliminates duplication of effort among member firms. [Emphasis added.]¹⁴

Wilkinson also noted that IEC had established the shared man program in Houston several years before IBEW opened its COMET campaign, but that "[a]lthough it was created for other reasons, this arrangement minimizes our members' exposure to the current 'salting' risk." The article concluded by repeating that "[c]urrently, the best bet for *some* anti-'salting' relief [absent greater relief through desired federal anti-salting legislation] is the program . . . run by IEC's Greater Houston Chapter." (Emphasis in original.)

Significantly, the record, including IEC's own newsletter, also shows that the nonunion employment market for electricians in the Houston area was extremely tight during the period at issue. The cover article of the IEC newsletter for March 1996, entitled "Struggling with Skills Shortages," stated in a subheading: "Open shop sector is hardest pinched; craft in shortest supply is electricians." The article, describing the findings of an industry study, went on to confirm that construction "nonsignatories [nonunion employers] in the economically robust western states are suffering the most," and that "[i]n Texas, electricians, pipe fitters and welders were in shortest supply." Similarly, L.L. Electric confirms in its brief that "it is typical in the electrical business for workers to find jobs quickly after placing an application" with IEC. This justifies an inference that during the period at issue a qualified journeyman electrician actively seeking

¹⁴ Similarly, Wilkinson stated that "[t]he bottom line, at least for us, is that IBEW's COMET campaign has created new opportunities for association growth. We're getting calls from open shop electricials [sic] all over the state who want us to expand our hiring referral and other programs."

work in the Houston area could normally expect to be hired by a contractor within a short time.

B. Analysis

Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. For the purpose of Section 8(a)(1), the motive for the employer's action is irrelevant; if the action, or sequence of actions, reasonably tends to interfere with the free exercise of rights under the Act, it is unlawful. *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999).

It is also well established that salts are employees protected under the Act, *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), and that actions taken by an employer to avoid hiring job applicants affiliated with unions are unlawful. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182–187 (1941); *Tim Foley Plumbing Service*, 332 NLRB 1432, 1438 (2000); *Tualatin Electric*, 319 NLRB 1237 (1995). Salting itself is protected, concerted activity, even if it is intended in part to provoke an employer to commit unfair labor practices. See, e.g., *M. J. Mechanical Services*, 324 NLRB 812, 813–814 (1997), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998); see also *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 546 (D.C. Cir. 2006); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1197 (D.C. Cir. 2003).

The judge found that IEC's "referral system" and two of the system's individual component features—the \$50 fee-per-additional-application imposed on new applicants but not on recently laid off employees of IEC members, and the shared man program—each violated Section 8(a)(3) and (1) by discriminating against union members. He also found that the application referral system's policy of refusing to tell applicants which employers had reviewed their applications was unlawful. For the following reasons, we find that the application referral system in its totality reasonably tended to interfere with the alleged discriminatees' exercise of their Section 7 rights and therefore violated Section 8(a)(1).

First, the application referral system's tendency to interfere with the exercise of Section 7 rights is directly confirmed by IEC's admissions in its own newsletter. These statements explicitly advertised the application referral system as an effective means to avoid hiring un-

ion members. 16 The IEC newsletters proudly cited the "[IEC] program" in Houston as "currently the best bet" for achieving that goal, and noted that the Union's salting campaign had generated a "tremendous demand for IEC services." One subheading announced, "Chapter runs 'hiring hall' to help contractors avoid 'salting' risk." The Houston chapter was described as having "developed" its "referral procedures" in order to "counter labor's attack on the open shop's skills' sources." All of those statements support the conclusion that the referral system had the intended effect of hindering union members' and salts' attempts to be hired by IEC members. 17

IEC contends that the statements in the newsletters expressed only IEC's and its members' protected 8(c) opinions, and cannot be cited as evidence of unlawful conduct. However, the above statements were not mere expressions of opinion. They identify *actions* the IEC had already taken and the effects of those actions, and they express a clear intent to continue engaging in the same conduct. ¹⁸ They therefore do not fall under the protection of Section 8(c) but constitute admissible evidence of wrongdoing. ¹⁹

Second, the material components of IEC's application referral system, considered as a whole, tended to interfere with Section 7 activity by disadvantaging salts and union applicants. As reviewed above, those components included: (1) the failure to keep records concerning the application referral service²⁰; (2) the policy of not reveal-

¹⁵ Because we find the IEC application referral system unlawful under Sec. 8(a)(1), we need not reach the issue of whether IEC, which was not itself an employer of electricians, also violated Sec. 8(a)(3), or whether individual components of the application referral system were inherently discriminatory or independently unlawful, as the judge found. We therefore do not adopt those findings.

¹⁶ In *Pollock Electric*, 349 NLRB 708 (2007), the General Counsel introduced one of the same newsletters and other publications as evidence of unlawful animus under Sec. 8(a)(3). However, because the judge in that case specifically chose not to rely on those publications for any of his findings, the Board did not reach the issue of their relevance. 349 NLRB at 710 fn. 13. In *Pollock*, moreover, neither IEC's application referral system nor the relevance of the publications to the system's legality was at issue.

¹⁷ We agree with the judge that the statements and articles in the IEC newsletters to its own members, quoted above, accurately reflected IEC's views, intentions, and knowledge of the material facts.

¹⁸ For this reason, our dissenting colleague's sweeping assertion that "it is undisputed that IEC did not screen the applications" is not supported by the record. While the evidence does not indicate that IEC literally "screened" union members' applications from being reviewed by its employer members, IEC's newsletter statements confirm that the referral service had the specific effect of avoiding the hiring of union members, and that this was a distinctive benefit of the service.

¹⁹ See, e.g., *Smith's Transfer Corp.*, 162 NLRB 143, 162 (1966), quoting Senator Taft in 2 Taft-Hartley Leg. Hist. 1541 (Sec. 8(c) "is limited to 'views, argument, or opinions' and does not cover . . . other statements which might be deemed admissions under ordinary rules of evidence"). IEC was free, of course, to express its negative view of the Union's salting campaign. That view, however, did not entitle IEC to take actions which would reasonably tend to interfere with the exercise of Sec. 7 rights.

²⁰ We reject IEC's contention that its application referral service operated merely as a "depository" or conduit of applications to its members and should not even be described as a "referral." This contention

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ing to applicants which IEC members had received or reviewed their applications; (3) the related policy of not permitting applicants to review their filed applications²¹; (4) the \$50 fee per application that IEC imposed in September 1997 on all applicants who filed more than one application within a 30-day period, with the exception of former employees of IEC members who had recently been laid off; and (5) in that connection, IEC employers' practice of reviewing only those applications that had been filed with IEC within the last few days.

Each of those components of the referral service facilitated the avoidance of hiring salts or union members and reasonably tended to interfere with union applicants' attempts to gain employment with IEC members. To the extent that applicants were required to apply for work through IEC in order to be considered for employment by IEC members but were unable to learn which employers reviewed their applications, it was impossible for applicants and the Union to determine how IEC and its members processed their applications or whether they had been victims of discrimination. Correspondingly, the policy of complete processing secrecy, along with IEC's failure to keep and retain any documentary record of its treatment of applications, allowed IEC employers to hire from a pool of applicants without creating any record of whom they considered and rejected. This gave each IEC employer member a defense against any allegation of unlawful discrimination to the extent that the employer relied on the referral service.²² The no-review/noinformation policy also made it more difficult for union applicants to elaborate on their qualifications or even to answer qualification-related questions. This limited access to prospective employers clearly operated to the detriment of union applicants, the large majority of

is inconsistent with the statements in IEC's newsletters. In its newsletters, IEC itself refers to the service variously as a "reliable labor pool," "hiring hall," "referral procedure," and "hiring and referral program."

whom had not previously worked for IEC employers and were therefore unknown to them. ²³

In addition, IEC's imposition of the \$50 fee for filing each followup application, excepting only recently laid-off IEC members' employees, inevitably reduced salts' and union applicants' chances of being hired. Given IEC members' preference for recently filed applications, the inability to file a new application every few days except at great cost virtually eliminated an applicant's chance of being considered for all but a few days during any 30-day period. At the same time, the fee exception for employees recently laid off by an IEC employer tended to ensure that those applicants, and only those, would have an application on file whenever an IEC employer wanted to hire. The timing of the fee—imposed after the salting campaign began—further indicates that it was aimed at reducing the number of union-affiliated applications.

Third, IEC's shared man program, by its operation in tandem with the application referral service tended further to ensure that union applicants would not be hired by IEC members. As noted above, the shared man program permitted members to borrow employees from other IEC members rather than hire new employees from outside. Inasmuch as all IEC employers were nonunion, the shared man program made it all the less likely that new union applicants would be hired.²⁴

Fourth, the coercive impact of the application referral service is further confirmed by an additional critical circumstance: there was considerable demand for skilled electricians in the Houston construction market at the time, which would have made it reasonable to expect that any competent electrician seeking work with employers in that industry would be hired quickly. And yet, as the judge observed, "[o]ne of the most startling facts in the evidence is that over 200 applications were filed by the alleged discriminatees—individuals with good credentials—over a period of about a year and three–quarters when numerous employees were being hired—and yet not one alleged discriminatee was hired." The Respondent employers' sustained refusal to hire any of the named discriminatees during the period at issue (or even

²¹ We do not rely on the Union's analogy of IEC's policy of not revealing which employers reviewed an application, to a union's refusal to divulge such information to its members in the hiring-hall context.

²² Employers' ongoing documentation of the hiring process and retention of those documents for inspection are basic requirements in the enforcement of Federal antidiscrimination law. Title VII of the 1964 Civil Rights Act, for example, requires employers and employment agencies to keep and retain employment records for 1 year after their creation. 42 U.S.C. § 2000e-8(c); 29 CFR § 1602.14. The Office of Federal Contract Compliance Programs similarly requires Federal contractors employing fewer than 150 employees to keep and retain hiring and employment records for 1 year (and employers of more than 150 for 2 years). 41 CFR § 60-1.12. Federal contractors employing 50 or more employees are also required to file "Employment Information Reports" to further preclude discrimination against protected classes.

²³ IEC and our dissenting colleague emphasize that some of its members had, on occasion, employed union members. However, those occasions were atypical, and in many cases the employee's union affiliation was in the distant past. On other occasions—as in the case of Neil Howland at KenMor Electric, discussed below—the employee had concealed his union affiliation. We therefore give no weight to the occasional exceptions to the rule that the Respondent Employers' employees were not union members.

²⁴ We do not find the shared man program, in itself, to be unlawful. However, in this case, the program had the predictable effect of increasing the tendency of the application referral service to deter the hiring of union applicants.

to call them for interviews) while hiring less qualified applicants, further discussed below, supports the finding that the IEC referral system—which they all used to some extent—tended to deter the hiring of union members.²⁵

For all of these reasons, we find that IEC's application referral system, in its totality, hindered the efforts of applicants who were salts and union members to be hired by IEC employer members, and reasonably tended to interfere with those applicants' right to seek employment on equal terms with other applicants. The application referral system therefore violated Section 8(a)(1).²⁶

In addition, we agree with the judge, for the reasons he relied on, that IEC was an agent of the Respondent Employers and that its actions with respect to referrals can be attributed to them. Furthermore, as noted above, all of the Respondent Employers made direct use of the application referral system to some extent. Accordingly, we conclude that all of the Respondents violated Section 8(a)(1) through their maintenance, support, and use of IEC's application referral system.

C. Response to Dissent

Our dissenting colleague advances two principal arguments that IEC's referral system cannot be found to violate Section 8(a)(1). First, he argues that the complaint alleged only an 8(a)(3) violation, and that by finding an 8(a)(1) violation, which was neither pled nor litigated, we have denied IEC the right to due process. Second, he argues that even assuming a properly pled and litigated 8(a)(1) allegation, the evidence fails to establish such a violation.

1. The procedural argument

Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense. Although such notice is usually furnished by the allegations set forth in the complaint, the Board has long held, with court approval, that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The dual requirements of *Pergament* are easily satisfied here, as the 8(a)(1) violation that we have found is closely connected to the 8(a)(3) complaint allegation, and it was litigated fully and fairly.

First, the "closely connected" element of the *Pergament* test requires both a close congruence between the complaint allegation and the unalleged violation found by the Board, and that the respondent had sufficient notice of the conduct found unlawful. Contrary to the dissent, notice does not mean that a respondent must be advised of the "legal theory upon which the General Counsel" relies. *Pergament United Sales v. NLRB*, supra, 920 F.2d at 135. Rather, as the Second Circuit explained, "notice must inform the respondent of the acts forming the basis" of the violation ultimately found, so that it can "prepare a defense . . . and fashion[] an explanation of events that refutes the charge of unlawful behavior." Id.

The close connection here between the 8(a)(3) complaint and the 8(a)(1) violation found is demonstrated by the fact that "both plainly focus on the same set of facts"—the methods and means by which IEC operated its application referral system. *Cardinal Home Products*, 338 NLRB 1004, 1007 (2003).²⁷ Further, the ultimate issue is the same in both instances—whether the IEC maintained and applied its application referral system in an unlawful manner. Id; *Pergament United Sales*, 296 NLRB at 335. IEC was clearly on notice from the outset of this proceeding that the legality of its referral system was the ultimate issue in the case, and, thus, was afforded an adequate opportunity to prepare a defense.

This leads to the second element of the *Pergament* test, i.e., whether the legality of the application referral system was fully litigated. The record shows that all the key issues surrounding the 8(a)(1) violation that we have found were fully litigated, as demonstrated by the documentary and testimonial evidence introduced at the hearing by IEC on its referral system, on which our 8(a)(1) finding is based. *Desert Aggregates*, 340 NLRB 289,

²⁵ Although we do not view the failure of the three-named discriminatees to be hired during the period at issue as dispositive in determining that the IEC application referral service was unlawfully coercive, their experience clearly provides evidentiary support for that conclusion.

²⁶ This case differs from *Centex Independent Electrical Contractors Assn.*, 344 NLRB 1393 (2005), cited in the dissent. That case involved a different IBEW local and addressed a later time period. Moreover, in contrast to this case, the findings in *Centex* were based almost entirely on the judge's refusal to credit union witnesses' testimony on two central fact allegations: (1) that IEC's executive director (not Wilkinson) made particular oral statements to them expressing unlawful animus; and (2) that IEC operated as the "exclusive" hiring agent for the corespondent employer. 344 NLRB at 1394, 1397, 1404. Neither fact issue is present in this case. And here, unlike in *Centex*, objective evidence including IEC's own newsletters linked its referral service to unlawful interference with Sec. 7 activity, confirming that the referral service operated to disadvantage salts and union applicants in their efforts to obtain employment with IEC's members.

²⁷ In *Champion International Corp.*, 339 NLRB 672 (2003), cited by our dissenting colleague, the Board specifically distinguished *Cardinal Home Products*, supra, on the ground that there the Board permissibly found an independent but unpled 8(a)(1) violation, noting that that violation "was based on the very same facts as the 8(a)(3) violation." 339 NLRB at 673. Such is the case here.

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293 (2003) (noting, among other factors, that the "Board has concluded that where the respondent's witnesses testified to facts giving rise to the unalleged violation, . . . the 'fully litigated' requirement is met').

In sum, because the dual requirements of the *Pergament* test have been met, our finding that the IEC referral system violates 8(a)(1) does not deprive the IEC of its due process rights. Accordingly, we reject our colleague's argument that our finding cannot be sustained on procedural grounds.

2. The argument on the merits

As to the merits, the dissent never comes to terms with the theory of liability on which our decision rests or with the facts that are material to finding a violation of Section 8(a)(1) here. Instead, our dissenting colleague chooses to examine each element of IEC's referral service in isolation, while putting aside its demonstrable interference with Section 7 rights and mischaracterizing our rationale as an "unprecedented version of disparate impact liability." It is telling that the dissent only grudgingly acknowledges that salting is statutorily protected activity and that unlawful interference with such activity does not require a showing of discrimination.

As we have explained, the record here demonstrates that IEC created what amounted to a closed and opaque referral system, frustrating the ability of union salts to be considered for employment and to be hired by individual. identifiable employers and to test whether those employers were, in fact, discriminating against union members (as, indeed, some were). The evidence is plain that this is what IEC intended—as discussed, the IEC touted the fact that it "runs [its] 'hiring hall' to help contractors avoid 'salting' risk"²⁸—and that the system operated in just this way. To conclude that the referral service violated Section 8(a)(1)—that it "interfere[d] with . . . employees in the exercise of the rights guaranteed in section 7," in the words of the Act—we need not find that it constituted "discrimination in regard to hire," as prohibited by Section 8(a)(3). Contrary to the dissent, then, the theory of violation here has nothing to do with "disparate impact," a concept developed in employment discrimination law to address facially neutral hiring criteria that have the effect of disqualifying a disproportionate number of persons based on their protected status.²⁹ The violation we find involves action that operates as a direct restraint on Section 7 protected conduct, namely salting. It is, thus, no answer for the dissent to say that the components of the referral service applied to "all applicants regardless of their union affiliation." The relevant question, rather, is whether the referral system interfered with the Section 7 activity of those union applicants who participated in the salting campaign, and whether IEC properly may be ordered to abandon the system. We are not finding that IEC itself refused to hire anyone in violation of Section 8(a)(3), nor, as explained below, are we ordering instatement or backpay for individual applicants as a remedy for the violation of Section 8(a)(1) that we do find.

Our colleague insists that IEC had legitimate and substantial business justifications for the referral service it created, which were not outweighed by the "supposed impact on Section 7 rights" that we have detailed. His arguments, however, fail to address the referral service as an integrated whole, instead treating its components as separate policies independently adopted by individual employers. We are dealing here, of course, with a referral system touted as a means of defeating a statutorily-protected salting campaign and used by a group of employers. Business justifications that might suffice if offered by an individual employer for an individual hiring policy, and if weighed against individual 8(a)(3) discrimination claims, do not tip the balance in the factual circumstances of this case.³¹

Power Co., 401 U.S. 424, 431 (1971), and Dothard v. Rawlinson, 433 U.S. 321 (1977) (disparate impact on women of uniformly applied height and weight restrictions established a prima facie case of discrimination).

³⁰ Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051, 1058–1060 (D.C. Cir. 2003), cited by the dissent, merely held that an unlawful motive must be proved to establish a violation of Sec. 8(a)(3), and that disparate impact cannot be relied upon alone to establish such a violation, at least where the Board had separately found that the respondent was *not* motivated by unlawful animus.

31 Bill's Electric, Inc., 350 NLRB 292 (2007), and Heiliger Electric Corp., 325 NLRB 966 (1998), cited by our colleague with respect to employer rights, are entirely consistent with our decision. In those cases, the Board held that the employers could lawfully prohibit salts from videotaping their application process because the videotaping was "disruptive" and "raise[d] concerns for office security." Bill's Electric, 350 NLRB at 295. The union salts' request for referral information by the salts in this case raised no such concerns, and IEC did not withhold the information on those grounds.

Our decision is also consistent with *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005), cited by the dissent. In that case, the Board found that an employer's facially neutral hiring criteria favoring former employees and employee-recommended applicants were lawful, even though applicants hired under those criteria "would tend not to be union supporters." 345 NLRB at 15. We do not find or imply otherwise here with respect to any of the Respondent Employers' own written hiring priorities.

The dissent unconvincingly describes this statement, and others like it, as "mere 'puffery," demonstrating no more than a desire to avoid exposure to meritless unfair labor practice charges.
29 As the Board has explained, under a "disparate impact" theory,

²⁹ As the Board has explained, under a "disparate impact" theory, "facially neutral employment policies that are 'fair in form,' i.e., they apply equally to blacks and whites or to women and men, nonetheless may be deemed unlawful if they are "discriminatory in operation." *Aztech Electric Co.*, 335 NLRB 260, 263 (2001), citing *Griggs v. Duke*

II. REFUSAL TO HIRE

The complaint alleged that Ray Rath, Troy Lockwood and John Gafford, three job applicants who were self-identified members of the Union, were passed over for consideration or for hire by the Respondent Employers because of their union affiliation. At the time of the events at issue, all three were paid organizers participating in the Union's COMET campaign.

A. The Alleged Discriminatees

Rath, a journeyman electrician since 1986, became a paid union organizer in 1995. Thereafter, he continued to work as an electrician on an occasional basis. During the period at issue, he held a current license from the city of Houston. In 1997, he completed a city of Houston update course for electricians.

Lockwood worked as a journeyman electrician for 10 years prior to becoming a paid union organizer in 1994. Thereafter, he continued to work as an electrician on an occasional basis. During the period at issue, Lockwood held a current license from the city of Houston and was a member of the National Electrical Inspectors Association. In 1997, Lockwood completed the Houston update course.

Gafford, a journeyman electrician for 21 years, worked continuously at his trade for 19 years before becoming a paid organizer. Thereafter, he continued to work as an electrician on an occasional basis. During the period at issue, he held a current city of Houston license and he also took the Houston update course in 1997.

Between early 1996 and September 1997, each of the discriminatees filed more than 70 job applications with IEC. Aware that IEC's contractor-members sought recent applicants, the discriminatees usually filed several applications each month. They stopped this practice when IEC imposed the \$50 fee discussed above. All three indicated on all of their applications that they were union organizers. None was hired by the Respondent Employers.

B. Analysis

1. Applicable law and findings in common

In *FES*, 331 NLRB 9 (2000), the Board set forth its analytical framework for determining whether an employer violates Section 8(a)(3) by failing or refusing to consider or hire job applicants because of their union activities or affiliation. With respect to discriminatory refusals to hire, the Board held:

[T]he General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the

hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. . . .

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. . . . [331 NLRB at 12 (footnotes omitted).]³²

Applying the *FES* framework in his supplemental decision, the judge affirmed his initial findings that Ken-Mor Electric, H & J Electric, and L.L. Electric each violated Section 8(a)(3) and (1) by failing to hire or consider Rath, Lockwood, and Gafford. We agree with the judge's refusal to hire findings.³³ Although we will apply the *FES* analysis to the facts pertaining to each discriminatee and Respondent Employer separately, in order to minimize repetition we will first identify the material evidentiary factors that are present in all of the alleged violations.

First, as we have already found, IEC was an agent of the Respondent Employers, and its actions with respect to application referrals and hiring can therefore be attributed to them. Moreover, as noted above, all of the Respondent Employers used IEC's application referral system (including its application referral service and shared man program), which we have found to violate Section 8(a)(1). As a consequence, the Respondent employers' use of those services supports the judge's finding that each of them made its hiring decisions with antiunion animus.

³² Regarding discriminatory refusals to consider for hire, the Board stated: "[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. If the respondent fails to meet its burden, then a violation of Sec. 8(a)(3) is established." Id. at 15.

³³ As set forth above, we find it unnecessary to pass on the judge's refusal to consider findings.

Second, we find that the IEC newsletters reviewed above, in addition to supporting our conclusion that IEC's application referral system was unlawfully coercive under Section 8(a)(1), strongly support the judge's findings that the Respondent Employers' hiring actions were unlawfully motivated. IEC's candid claims that "IEC members can defeat COMET" by using its application referral service and shared man program and that those programs were "[c]urrently, the best bet for some anti-'salting' relief," express an antiunion animus which is directly attributable to the Respondent Employers.

Third, as the judge found from the credited evidence, each of the Respondents gave pretextual reasons for not hiring the discriminatees. The proffer of a pretextual reason for a respondent's action—i.e., a false reason or one not in fact relied upon—supports an inference of antiunion animus.³⁴ Further, a respondent "cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation."³⁵

Fourth, the March 1996 IEC newsletter's confirmation that the "Open shop sector is hardest pinched," and that the "craft in shortest supply is electricians," along with L.L. Electric's confirmation that it was "typical" for qualified applicants to "find jobs quickly after placing an application" with IEC, establish that skilled electricians were in great demand in Houston during the period at issue. This evidence strongly indicates that a qualified journeyman electrician would have been hired soon after submitting an application to a common, unbiased source of referrals. That inference, in turn, supports the conclusion that the discriminatees—all highly qualified and experienced electricians—would each have been hired on at least an occasional basis during a 21-month period when they were continuously applying—directly to employers and through IEC-in the absence of antiunion animus on the part of the Respondent Employers.

Having cited this evidence, relevant to the allegations against all three Respondent Employers, we review the additional, case-specific evidence pertaining to each. Although we cite the most significant evidence, except where indicated we also rely on the other evidence cited by the judge.

2. KenMor Electric

KenMor used IEC as its exclusive source for job applicants

Rath and Lockwood filed applications for employment with IEC on January 8 and 9, 1996, respectively, indicating that they were union organizers. Gafford filed an application for employment with IEC on February 13, 1996, indicating that he was an electrician/organizer. All three continued to file applications with IEC on a monthly basis for the rest of the year, and more frequently the next year, until IEC instituted the \$50 fee discussed above.

From January 9, onward, IEC forwarded applications to KenMor. KenMor hired journeymen on January 9 and 22, and it hired several more journeymen the following month, including one on February 17.

The judge found that KenMor violated Section 8(a)(3) and (1) by failing and refusing to hire or consider Rath and Lockwood on January 9, and continuing thereafter, and by failing and refusing to hire or consider Gafford on February 17, and continuing thereafter.

KenMor defends its failure to hire Rath and Lockwood on January 9, and its failure to hire Gafford on February 17, on the ground that it did not receive applications from them on or before those dates. The judge found that KenMor received Rath's and Lockwood's January applications, dated January 8 and 9, respectively, on January 9, and it received Gafford's February 13 application on or before February 17. We find no basis for reversing this finding.

According to KenMor, the discriminatees were eventually considered, but they were not hired because their work histories rendered them unqualified or, even if they were qualified, the individuals hired by the Company were more qualified. Specifically, KenMor argues that it did not hire Lockwood—first considered by the company sometime in the "first quarter" of 1996—because he lacked recent electrical experience; it did not hire Rath—first considered by the Company "around the first part of July" 1996—because he lacked recent electrical experience and had a poor work history; and it did not hire Gafford—first considered by the Company in September 1996—because he lacked recent electrical experience.

³⁴ Leading Edge Aviation Services, 345 NLRB 977, 977–978 (2005), enfd. 212 Fed. Appx. 193 (4th Cir. 2007).

³⁵ Jesco, Inc., ³47 NLRB 903, 907 (2006). Accord: Leading Edge Aviation Services, 345 NLRB at 978 ("Because the Respondent's reasons for not hiring Host for the second shift QC inspector position have been found to be pretextual—i.e., they either did not exist or were not actually relied on—they cannot form the basis for a valid rebuttal to the General Counsel's case.").

³⁶ Lockwood had worked for KenMor in the late 1980s. When he was hired at that time, Lockwood had been made to sign a written promise that he would not engage in union activity.

³⁷ Hereafter, unless otherwise indicated, all dates pertaining to Ken-Mor are in 1996.

³⁸ Although KenMor acknowledges that it received an application from Lockwood sometime during the "first quarter" of 1996, the Company's equivocation as to the date of receipt is tantamount to a denial that it received and considered Lockwood's application on January 9, the first date of discrimination found by the judge.

In agreement with the judge, we conclude that Ken-Mor's hiring record belies its assertions that it required recent electrical experience³⁹ or a "solid, consistent work history." Even assuming that KenMor required recent electrical experience or that the discriminatees were not as qualified as others hired instead, this defense fails because it was not the reason relied upon by KenMor when it rejected the discriminatees in January and February 1996. *Jesco*, supra, 347 NLRB at 907.

We find, based on the foregoing, that the General Counsel established a prima facie case of discrimination under *FES*, supra, which KenMor has not rebutted. First, KenMor was hiring when, in January and February 1996, Rath, Lockwood, and Gafford applied for positions with KenMor through its hiring agent, IEC. Second, the discriminatees had qualifications relevant to the positions for which KenMor was hiring. Finally, the General Counsel demonstrated that antiunion animus contributed to KenMor's decision not to hire Rath, Lockwood, and Gafford. KenMor's proffering of pretextual reasons for failing to hire union-affiliated applicants supports an inference that the failure was based on antiunion considerations. See *Leading Edge Aviation Services*, supra, 345 NLRB at 978.⁴¹

As the General Counsel has met his initial burden under *FES* regarding KenMor's refusal to hire the union applicants, the burden shifted to KenMor to show that it would not have hired them even in the absence of their union activity or affiliation. *FES*, supra at 12. Because KenMor's reasons for not hiring the discriminatees have been found to be pretextual, they cannot form the basis

for a valid rebuttal to the General Counsel's case. ⁴² Accordingly, we adopt the judge's finding that KenMor violated Section 8(a)(3) and (1) by failing to hire Rath and Lockwood on and after January 9, and by failing to hire Gafford on or after February 17. ⁴³

3. H & J Electric

H & J Electric hired employees directly and gave preference to former employees, but has also sometimes required applicants to file applications with IEC.

Rath, Lockwood, and Gafford filed applications for employment at IEC on March 17, 1997.44 That same day, H & J Electric received about eight applications from IEC, including the applications of the discriminatees, 45 and it hired one of the individuals whose application was included in that group (Todd Hebert). Jones attempted to contact three other electricians whose applications were included in the March 17 group, but he was unsuccessful. Jones did not attempt to contact the discriminatees. Unable to meet its manpower needs through IEC, H & J Electric turned to a temporary staffing service, Link Staffing, which sent it two journeymen per day, beginning on March 25, and continuing until May 4. The Link Staffing referrals cost H & J Electric more than it would have had to pay if it had used its own employees.

The judge found that H & J Electric discriminatorily refused to hire Rath, Lockwood, and Gafford, or consider them for employment, on March 25, and continuing thereafter.

H & J Electric defends its failure to hire the discriminatees on the ground that they did not indicate on their applications that they had experience with cable tray or rigid pipe wiring methods, an ostensible requirement

³⁹ For instance, KenMor hired Roy Langerhaus as a journeyman in March 1997, even though he had not worked in approximately 7 months, and it hired Neal Howland as a journeyman in March 1998, even though his employment application indicated that in the previous year he had been working in sales at Amway. KenMor attempts to explain away these and other deviations from its alleged hiring policy—Langerhaus had been out of work due to a personal tragedy and Howland's hiring, although admittedly a "glaring exception to KenMor's hiring policy," was a mistake—but the fact remains that those and other applicants were hired as journeymen even though they lacked recent electrical experience.

⁴⁰ For instance, KenMor rehired Shane Scallan in September 1997, notwithstanding that he had been suspended more than a year earlier for failing a drug screen following an accident.

⁴¹ With respect to motive, we again rely on IEC's unlawful referral system, the IEC newsletters, and the local demand for skilled electricians, described above. We also rely on KenMor's failure to credit Lockwood and Gafford for traffic signal work even though KenMor was engaged in a traffic light project, and on KenMor's hiring of applicants with similar or lesser qualifications and experience. In addition, we give some weight (though not dispositive, given the distance in time) to KenMor's earlier having required Lockwood to agree in writing not to engage in union activity.

⁴² Jesco, Inc., supra, 347 NLRB at 907. Leading Edge Aviation Services, supra, 345 NLRB at 978.

⁴³ Our decision in *Pollock Electric, Inc.*, supra, 349 NLRB 708, is distinguishable. In that case, we held that the respondent employer did not violate the Act by refusing to consider or hire Rath, Lockwood, Gafford, and other union salts, where the employer considered them "in the same way that other applicants were considered," but declined to hire them because of their lack of recent experience with their tools, as required by the company's hiring policy. Id. at 711. As determined by the judge, KenMor did not require recent experience and, in any event did not consider Rath, Lockwood, and Gafford in the same way that other applicants were considered. Indeed, Rath and Gafford were not considered at all during the first half of 1996, even though the Company received applications from them during that timeframe, at times when it was hiring.

⁴⁴ Hereafter, unless otherwise indicated, all dates pertaining to H & J Electric are in 1997.

⁴⁵ Lance Jones, a project manager for H & J Electric, acknowledged that Rath's application was in the group of applications received on March 17. We agree with the judge that Lockwood's and Gafford's applications, filed the same day, were also received by H & J Electric on March 17.

during the period at issue. In agreement with the judge, we find that this defense is pretextual. First, H & J Electric did not establish that all four of the March 17 applicants that it attempted to contact—i.e., nearly everyone but the discriminatees—listed cable tray or rigid pipe experience on their applications. Second, H & J Electric accepted referrals from Link Staffing without reviewing the referrals' applications. Third, H & J Electric's determination that two Link Staffing referrals were unqualified—one could not hang cable tray and the other was dismissed for "general incompetence"—belies the notion that Link Staffing screened applicants in any meaningful way (i.e., for cable tray or rigid pipe skills/experience). Finally, the judge credited the discriminatees' testimony that, as experienced journeymen, they were qualified to work with cable tray and rigid pipe.

We find, based on the foregoing, that the General Counsel established a prima facie case of discrimination under *FES*. First, H & J Electric was hiring when, on March 17, Rath, Lockwood, and Gafford applied for positions with H & J Electric through its hiring agent, IEC. Second, all three individuals had qualifications relevant to the positions for which H & J Electric was hiring. H & J Electric's proffering of a pretextual reason for failing to hire union-affiliated applicants supports an inference that the failure was based on antiunion considerations. See *Leading Edge Aviation Services*, supra, 345 NLRB at 978. 46

As the General Counsel has met his initial burden under *FES* regarding H & J Electric's refusal to hire the union applicants, the burden shifted to H & J Electric to show that it would not have hired them even in the absence of their union activity or affiliation. *FES*, supra at 12, 15. Because H & J Electric's reason for not hiring Rath, Lockwood, and Gafford has been found to be pretextual, it cannot form the basis for a valid rebuttal to the General Counsel's case.⁴⁷ Accordingly, we find that H & J Electric unlawfully refused to hire Rath, Lockwood, and Gafford on or after March 25, 1997.

4. L.L. Electric

L.L. Electric both accepted applications directly and reviewed applications at IEC.

Rath, Lockwood, and Gafford filed applications with IEC on February 13, 1997.⁴⁸ Rath, Lockwood, and Gafford filed applications for employment with IEC again on March 18, 19, 20, and 31, 1997.⁴⁹

L.L. Electric hired journeymen on February 7 (Roy Rodriguez) and March 31 (John Rogers), and it hired several apprentices between February 14 and the end of March. At least two of the "apprentices" hired during this timeframe—Mike Walling and Jeff Walt—were actually journeymen. The Company hired Walling on February 14, at \$13.75 per hour, and it hired Walt on March 20, at \$13 per hour. ⁵⁰ Those starting rates surpassed the starting rates of acknowledged journeymen Rodriguez (\$12 per hour) and Rogers (\$12.50 per hour) and indicate that, in fact, Walling and Walt were hired as journeymen.

The judge found that L.L. Electric discriminatorily refused to hire Rath, Lockwood, and Gafford, or consider them for employment, on February 14, and continuing thereafter.

Although L.L. Electric's president, Louis Lee, denied seeing Lockwood's, Rath's or Gafford's applications, the judge discredited that testimony, and, thus, concluded that Lee reviewed those applications when he looked through the applications at IEC's office. We find no basis for reversing that credibility finding.

Based on the foregoing, we find that the General Counsel has established a prima facie case of discrimination under *FES*. First, it is clear that L.L. Electric was hiring when, in February and March 1997, Rath, Lockwood, and Gafford applied for positions with L.L. Electric through its hiring agent, IEC. Second, it is equally plain that Rath, Lockwood, and Gafford were qualified for the positions for which L.L. Electric was hiring. Finally, the General Counsel demonstrated that antiunion animus contributed to L.L. Electric's decision not to hire these three applicants. L.L. Electric's proffering of a pretextual reason for failing to hire union-affiliated applicants supports an inference that the failure was based on antiunion considerations. See *Leading Edge Aviation Services*, supra, 345 NLRB at 978.⁵¹

⁴⁶ The judge's finding of unlawful animus is further supported by H & J Electric's partial reliance on IEC's unlawful referral system, the IEC newsletters, and the local demand for skilled electricians, as well as H & J Electric's hiring of temporary journeymen from an outside agency without even knowing their qualifications, at higher cost than it would have incurred by hiring its own employees. *Fluor Daniel*, 333 NLRB 427, 439 fn. 71 (2001) (hiring nonunion applicants at a higher cost than available union applicants is evidence of unlawful motive), enfd. in relevant part 332 F.3d 961 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005); *KRI Constructors*, 290 NLRB 802, 808 (1988) (same)

⁴⁷ Jesco, Inc., supra, 347 NLRB at 907; Leading Edge_Aviation Services, supra, 345 NLRB at 978.

⁴⁸ Gafford also filed applications with IEC on February 12 and 14.

⁴⁹ Hereafter, unless otherwise indicated, all dates pertaining to L.L. Electric are in 1997.

⁵⁰ L.L. Electric claims that Walt was borrowed from another contractor, not hired, on March 20, and hired sometime later. We find no merit in this exception because the judge's finding is consistent with L.L. Electric's records, which identify Walt as a new hire as of March 20.

⁵¹ With respect to motive, L.L. Electric's use of IEC's unlawful referral system, the IEC newsletters, and the local demand for skilled electricians further support the judge's finding of antiunion animus.

As the General Counsel has met his initial burden under *FES* regarding L.L. Electric's refusal to hire the union applicants, the burden shifted to L.L. Electric to show that it would not have hired them even in the absence of their union activity or affiliation. *FES*, supra at 12, 15. Because L.L. Electric's reason for not hiring Rath, Lockwood, and Gafford has been found to be pretextual, it cannot form the basis for a valid rebuttal to the General Counsel's case. Accordingly, we agree with the judge's finding that L.L. Electric unlawfully refused to hire Rath, Lockwood, and Gafford on or after February 14, 1997.

AMENDED REMEDY

In view of the Respondents' extensive and ongoing violations of Section 8(a)(1) and (3), which affected a large number of job applicants in addition to the named discriminates in a regional industry over at least a 2-year period, we agree with the judge that a broad cease-and-desist order is warranted, enjoining the Respondents not only from committing the kinds of violations found in this case but from violating the Act "in any other manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

Further, in light of our findings that the Respondents violated Section 8(a)(1) by maintaining, supporting, and/or using an unlawful application referral system, and that the Respondent Employers made discriminatory use of that system to avoid hiring union members, we will require IEC to maintain written records of its referral operations for 2 years, and to make those records available upon request to the Regional Director. We will similarly require all of the Respondent Employers to maintain written records of their respective hiring of journeyman electricians for the same period, and to make those records available upon request to the Regional Director. Each of the Respondents will also be required to submit quarterly reports to the Regional Director concerning (in the case of IEC) all processing and referral activities in connection with applications from selfidentified union applicants, and (in the case of each Respondent Employer) all hiring. These affirmative documentation requirements are similar to the remedies the Board has imposed on union hiring halls that have been found to violate the Act in connection with the referral of job applicants.⁵³

Having found that each of the Respondent Employers discriminatorily refused to hire the discriminatees, the Respondent Employers must offer them instatement and make them whole for their unlawful conduct against them. The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵⁴

ORDER

The National Labor Relations Board orders

A. The Respondent, Independent Electrical Contractors of Houston, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Maintaining an application referral system for its member contractors that interferes with or coerces employees in the exercise of the right to engage in union activity.
- (b) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Maintain, for a 2-year period from the date of this Order, written records of the operation of its application referral system, including applications, hiring records, and information sufficient to disclose how employment applications are processed, marked, or segregated, and the basis for each referral or failure to refer an application to an employer seeking applications and, upon the request of the Regional Director for Region 16 or his agents, make available for inspection, at all reasonable times, any records relating in any way to the application referral system.
- (b) For a 2-year period from the date of this Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the processing and referral of the applications of union applicants Ray Rath, Troy Lockwood, and John Gafford, and other self-identified union applicants. Such reports shall include the number of job applications submitted by such applicants, the date of each application, the number of times in which they were referred to member employ-

⁵² Jesco, Inc., supra, 347 NLRB at 907; Leading Edge Aviation Services, supra, 345 NLRB at 978.

⁵³ See *Tri-County Roofing*, 311 NLRB 1368, 1370 (1993), enfd. mem. 148 LRRM 2640 (3d Cir. 1995), cert. denied sub nom. *Roofers Local 30 v. NLRB*, 516 U.S. 818 (1995); *Boilermakers Local 154 (Western Pennsylvania Service Contractors)*, 253 NLRB 747, 766 (1980), enfd. mem. 676 F.2d 687 (3d Cir. 1982).

⁵⁴ Although our order herein provides for instatement, the instatement award is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that the discriminatees would still be employed if they had not been victims of discrimination. *Oil Capitol Sheet Metal*, 349 NLRB at 1354.

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ers, and the names of the member employers to which the applications were referred.

- (c) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked "Appendix A."55 Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent IEC's authorized representative, shall be posted by Respondent IEC and maintained for 60 consecutive days in conspicuous places, including all places where notices to the public, including applicants for employment with IEC's members, are customarily posted. Reasonable steps shall be taken by Respondent IEC to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all job applicants who have submitted applications to it at any time since January 11, 1996.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent IEC has taken to comply.
- B. The Respondent, KenMor Electric Company, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Maintaining, supporting, and using the unlawful application referral system operated by the Independent Electrical Contractors of Houston, Inc. (IEC).
- (b) Refusing to hire employees because of their union affiliation or activity.
- (c) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Within 14 days from the date of this Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

(b) Make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Supplemental Decision.

- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.
- (d) Maintain, for a 2-year period from the date of this Order, written records of its hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, make available for inspection, at all reasonable times, any records relating in any way to its use of IEC's application referral system.
- (e) For a 2-year period from the date of this Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all em-

⁵⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁵⁶ See fn. 55, supra.

ployees employed by the Respondent on or at any time since January 9, 1996.

- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.
- C. The Respondent, H & J Electric Co., Houston, Texas, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Maintaining, supporting, and using the unlawful application referral system operated by the Independent Electrical Contractors of Houston, Inc. (IEC).
- (b) Refusing to hire employees because of their union affiliation or activities.
- (c) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Within 14 days from the date of this Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.
- (b) Make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Supplemental Decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.
- (d) Maintain, for a 2-year period from the date of this Order, written records of its hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, make available for inspection, at all reasonable times, any records relating in any way to its use of IEC's application referral system.
- (e) For a 2-year period from the date of this Order submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates

- of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees employed by the Respondent on or at any time since March 25, 1997.
- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.
- D. The Respondent, Louis P. Lee d/b/a L.L. Electric Co., Houston, Texas, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Maintaining, supporting, and using the unlawful application referral system operated by the Independent Electrical Contractors of Houston, Inc. (IEC).
- (b) Refusing to hire employees because of their union affiliation or activities.
- (c) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Within 14 days from the date of this Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist,

⁵⁷ See fn. 55, supra.

to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

- (b) Make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Supplemental Decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.
- (d) Maintain, for a 2-year period from the date of this Order, written records of its hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, make available for inspection, at all reasonable times, any records relating in any way to its use of IEC's application referral system.
- (e) For a 2-year period from the date of this Order submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked "Appendix D." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during

the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees employed by the Respondent on or at any time since February 14, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD MEMBER SCHAUMBER, dissenting in part.

Respondent Independent Electrical Contractors of Houston (IEC) has collected job applications and forwarded them to its members for many years. Although this process was put in place before any union organizing and applied to all applicants regardless of union affiliation, the majority nevertheless determines that it was "a means to avoid hiring union members." Largely because the process allegedly reduced the number of successful union applicants, my colleagues find the process "in its totality" is unlawful. This finding goes well beyond anything alleged in the complaint, and thus denies IEC due process of law. This theory also goes well beyond anything the Act permits. While other employment statutes may impose liability for employment practices with a disparate impact on a protected class, the Act does not. The majority has substituted its judgment for that of Congress, and its broadly worded decision unjustifiably calls into question legitimate and widely used employment practices. I dissent from this finding of violation.

⁵⁸ See fn. 55, supra.

¹ For the reasons stated herein, I find that Respondent IEC violated Sec. 8(a)(3) and (1) by imposing a \$50 fee on repeated "outside" applications in September 1997.

I also concur in finding that individual Respondent Employers violated Sec. 8(a)(3) and (1) by failing to hire applicants Ray Rath, Troy Lockwood, and John Gafford. In making these findings, I do not rely on these employers' use of the IEC application service nor on the statements made by IEC officials allegedly showing animus on the part of IEC and its members. The imposition of the \$50-application fee does evidence animus, and I agree that this animus can be imputed to the Respondent Employers in the circumstances of this case. Under all the circumstances, I agree that a discriminatory refusal to hire has been established. Because the discriminatees are salts, their entitlement to

Facts

IEC is an association of over 100 Houston-area electrical contractors. Beginning in 1990, it has acted as a point of contact for job applicants by accepting applications and forwarding them to member employers who request them. Some member employers use this system as their sole source for applicants, while others use it only as an adjunct to other employment procedures. IEC sorts the applications into three categories: journeymen, apprentices, and inexperienced applicants, but does not screen them in any way. Instead, at the end of each day IEC faxes all of the applications received that day to the employers who request them. Alternatively, some employers choose to review applications in IEC's office. After 30 days, the applications are filed for a year.

Under longstanding procedures, IEC does not disclose to applicants which employers received their applications, allow them to review their own applications, or keep records showing referrals. These policies were implemented long before the onset of the union salting campaign in the mid-1990s and were applied in a non-discriminatory fashion to all applicants regardless of union affiliation.

Some, but not all, IEC members also participate in a "shared man" program under which members with extra workers loan them to other members who need workers. Under this program, the borrowing employer pays the employee the same wage rate and fringe benefits as the lending employer pays even if they are different from the wages and benefits paid by the borrower to its own employees.²

In 1997, after the onset of the salting campaign, IEC imposed a \$50-application fee for each application filed within a 30-day period of a prior application. Thus, all applicants could file one application every 30 days free of charge. Employees laid off from an IEC member could file additional applications within the ensuing 30 days free of charge, while other applicants had to pay a \$50 fee for each such application.

instatement or backpay is subject to the principles set forth in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), petition for review dismissed 561 F.3d 497 (D.C. Cir. 2009), and *Contractor Services*, 351 NLRB 33 (2007). In this regard, I note that the discriminatees submitted applications to the individual Respondent Employers at about the same time. Allegations that they were discriminatorily denied hire by other employers, based on still more applications filed at about the same time, were settled in 2009. At compliance, it will be appropriate to determine whether the discriminatees could have worked for all of these Employers at the same time and to adjust any remedy provided them accordingly.

² The judge found that the borrower does not pay the employee's medical insurance or pay them for holidays or vacation time. However, the employee must agree not to take vacations or holidays during the loan period.

The complaint alleges that IEC, by these practices, has maintained a discriminatory referral system to discourage employees from forming, joining, or assisting the Union and thereby discriminated against employee applicants in violation of Section 8(a)(3) and (1). There is no complaint allegation that these practices independently violated Section 8(a)(1).

The Judge's Opinion

The judge found, in relevant part, that the shared man program was "inherently discriminatory" because, in his view, the supposed adverse effect on employment opportunities for union applicants outweighed the Respondents' business justification of maintaining a pool of qualified workers and avoiding the expenses associated with layoffs and rehiring. He found, with no supporting analysis, that the limits on disclosure of application information was "unlawful" because it prevented applicants from learning whether their application had been considered. In both respects, the judge found that the policies were discriminatory under Section 8(a)(3) and (1).

The Majority Opinion

The majority abandons the judge's theory of violation, but reaches the same result under a newly-fashioned standard that was neither pled nor litigated. They find that IEC's "referral system in its totality" violated Section 8(a)(1) because it purportedly interfered with the ability of the alleged discriminatees to exercise their Section 7 rights. Although they say that IEC's motive is irrelevant, my colleagues find that the "referral system" was intended to hinder union members' and salts' attempts to be hired by IEC members. While acknowledging that some union members were hired under IEC's policies, the majority gives this evidence "no weight" because "those occasions were atypical, and in many cases the employee's union affiliation was in the distant past."

My colleagues further conclude that its components taken as a whole disadvantaged salts and union applicants by hindering their ability to "determine how IEC and its members processed their applications or whether they had been victims of discrimination" and by giving the IEC members "a defense against any allegation of unlawful discrimination." According to the majority, the shared man system further contributed to this supposed illegality because this use of borrowed employees from nonunion IEC members made it less likely that "new union applicants would be hired." And they find support for their finding of a violation of the Act in the alleged impact of the challenged policies on the hiring prospects of the alleged discriminatees. As shown below, none of

these justifications for the outcome the majority reaches today has any merit.

Analysis

A. The Disputed Employment Practices were not Discriminatory

The Board has previously determined that the shared man program does not discriminate against union supporters in violation of Section 8(a)(3) and (1). *Pollock Electric*, 349 NLRB 708, 710 (2007). The respondent employer in *Pollock Electric* was a member of IEC and used the same shared man program at issue in this case as part of a hiring policy that gave preference to former employees and those recommended by IEC members, among other categories. The complaint in the case alleged, and the judge found, that the entire hiring policy unlawfully discriminated against union members. The judge opined that the shared man policy unlawfully excluded union members from employment because "the other IEC members would not have any union members to share." Id. at 719.

The Board squarely rejected this finding of violation, noting that "[t]he Board has repeatedly found that hiring policies that give priority to former employees and recommended employees are not unlawful, even if the effect of such policies is to limit or exclude union applicants." Id. at 710. This ruling was based on well-settled principles respecting an employer's right to establish reasonable, nondiscriminatory hiring practices. The shared man program is just such a practice, reflecting IEC member employers' understandable and legitimate interest in preferring a "known quantity" over an unknown, offering steady work to their employees, minimizing periods of unemployment and consequent liability for unemployment benefits, and thereby allowing them "to attract a qualified, dependable work Zurn/N.E.P.C.O., 345 NLRB 12, 15 (2005), petition for review denied 243 Fed. Appx. 898 (6th Cir. 2007). See also Centex Independent Electrical Contractors Assn., 344 NLRB 1393, 1398-1399 (2005) (preference for known candidates over unknown legitimate); Kanawha Stone Co., 334 NLRB 235 (2001) (same); Belfance Electric, 319 NLRB 945, 946 (1995) (same).³

The limits on disclosure of application information IEC has established also are reasonable, nondiscriminatory hiring practices. Like the shared man program, these policies also predate any union organizing activity and have been uniformly applied to all applicants regardless of union affiliation. There is no evidence that IEC

ever provided information to nonunion applicants that was denied to the alleged discriminatees. Like the shared man program, they served a legitimate business purpose—in this case limiting the already-considerable time and expense of operating the application clearinghouse. See Tradesmen International, Inc., 351 NLRB 399, 401 (2007) (employer policy against walk-in applications lawful basis for reusing to hire walk-in union applicants; policy in place prior to salting campaign and consistently enforced); Dilling Mechanical Contractors, 348 NLRB 98, 101-102 (2006) (preference for referrals and policy of discarding applications from nonreferred applicants after 7 days all lawful); Custom Topsoil, Inc., 328 NLRB 446, 447 (1999) (rules limiting number of applicants allowed in its office at one time and affording interviews to "familiar" applicants before they completed applications but not "stranger" applicants all lawful); Dalton Roofing Service, 344 NLRB 870, 872–873 (2005) (policy requiring applicants to complete applications on premises lawful). Moreover, they have no impact on any applicant's opportunity to be considered for employment or hired by any IEC member. Indeed, it is undisputed that IEC did not screen the applications it received but instead transmitted all of them to participating employers.

Consistent with this well-settled precedent, the complaint allegation that IEC unlawfully maintained a discriminatory referral system must be dismissed.

B. The Disputed Employment Practices also did not Independently Violate Section 8(a)(1)

Apparently recognizing that application of existing precedent would compel dismissal of the complaint allegations as pled by the General Counsel, the majority reaches out to find the policies unlawful as independent violations of Section 8(a)(1). This approach is flawed for many reasons. First, the complaint was not pled nor was the case litigated on this basis. My colleagues' use of this theory in these circumstances therefore violates the Respondents' due process rights. Second, no cognizable Section 7 right was impaired by these rules. Finally, by adopting this analysis the majority seeks to impose a form of disparate impact liability on employers covered by the Act. The Act does not permit the imposition of liability on that basis, however, and even if it did, the majority's unprecedented version of disparate impact liability goes well beyond anything recognized under the Act or any other employment discrimination law. There is no warrant for this radical departure from settled principles.

³ The majority provides no support for the view that IEC's individual member employers could lawfully adopt such preferences but IEC itself could not.

By finding a violation of the Act under a new and unpled theory, the majority has denied the Respondents due process of law

The Board has indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change." Lamar Advertising of Hartford, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted). In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the theory ultimately applied. See generally Sierra Bullets, LLC, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when the General Counsel expressly litigated case on narrow theory).

In the present case, the General Counsel's complaint and representations reasonably led the Respondents to believe that they were defending against an allegation that the disputed employment practices discriminated against union supporters in violation of Section 8(a)(3) and (1). The complaint alleged a violation on this basis alone; it contains no allegation that the practices independently violated Section 8(a)(1). Likewise, the General Counsel's opening statement included the representation that "[t]he General Counsel will show that the Respondent, and I.E.C.'s hiring system, is discriminatory, and that it violates the Act, because it discriminates against union members."

This was the theory under which the judge found IEC's employment practices unlawful, as noted above. The majority's theory is quite different. They assert that the disputed hiring practices interfere with employees' Section 7 rights without regard to whether they are discriminatory or the employer's motive—facts that are essential elements of a violation under Section 8(a)(3) of the Act. Instead, the majority finds the practices unlawful because they interfered with employees' Section 7 rights to engage in "salting"—by allegedly limiting the ability of union applicants to determine whether they had been victims of discrimination, giving member employers a defense to any allegation of unlawful discrimination, and generally reducing employment opportunities for union applicants. These alleged effects were irrelevant to the theory of violation advanced by the General Counsel, and the Respondents had no notice that they were at issue in this case. See Champion International

Corp., 339 NLRB 672, 673 (2003) ("It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is."). By finding a violation of the Act under a theory neither pled nor litigated, the majority has denied the Respondents due process of law. Paul Mueller Co., 332 NLRB 1350 (2000).

2. Even if the issue were before us, the disputed employment practices do not independently violate Section 8(a)(1)

The 8(a)(1) standard begins with an examination of whether the employer's conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.⁵ ANG Newspapers, 343 NLRB 564, 565 (2004). If that showing is made, "the burden is on the employer to demonstrate a legitimate and substantial business justification for its conduct. It is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." Id. (internal quotation and citation omitted). Here, the disputed IEC policies did not limit any employee's ability to fully exercise their Section 7 rights. And IEC has demonstrated legitimate and substantial business justifications for these policies, as discussed above. Tellingly, the majority does not even consider those justifications, as longstanding precedent requires, much less show that they are outweighed by the policies' supposed impact on Section 7 rights.

Instead, the majority condemns the policies because they allegedly disadvantaged salts and other union applicants in their efforts to obtain employment with the Respondents. This contention is both factually and legally wrong. The limits on disclosure of application information did not disadvantage union applicants because they applied equally to all applicants regardless of union af-

⁴ In *Cardinal Home Products*, 338 NLRB 1004, 1006–1007 (2003), the Board found that the promotion of five employees from temporary to permanent status could be found to independently violate Sec. 8(a)(1) even though the complaint alleged it as a violation of Sec. 8(a)(3). There, the theory of the 8(a)(1) violation—that the employees were promoted in order to convince them to vote against the union and to remind employees of its power over their benefits—was consistent with the complaint allegation of discrimination to discourage support for the union. In this case, the theories do not align in this manner as explained above.

⁵ Sec. 7, in turn, guarantees employees the right to form, join, or assist a labor organization, bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid or protection—or to refrain from any of these activities.

⁶ Instead, the majority asserts that even if these business justifications "might suffice" for an individual employer, they cannot be relied upon by IEC. I perceive no valid justification for this implausible distinction

filiation.⁷ Moreover, the policies had no effect on their employment opportunities because IEC did not screen applications but instead forwarded them on request to its members. Any subsequent hiring discrimination that may have occurred was the result of the independent hiring decisions of the member employers—not these policies. Even if IEC's policies did give an advantage to former employees over "unknowns," such a preference is lawful for the reasons stated above.

In a vain effort to bolster their case, the majority asserts that the limits on disclosure of application information prevented applicants from learning how their applications were processed. Even if that is true, there is no Section 7 right to receive such information. Obviously, the rules did not prevent the alleged discriminatees from learning whether they had been victims of discrimination. This case itself is proof of that. Nor has the Board ever recognized a Section 7 right to detect discrimination. To the contrary, the Board has repeatedly recognized "an employer's unilateral right to establish the manner and mode of its application process." Bill's Electric, Inc., 350 NLRB 292, 305 (2007). Accord: Heiliger Electric Corp., 325 NLRB 966, 968 (1998). In Bill's Electric, the Board held that the employer lawfully refused to hire union applicants who disregarded the employer's direction to stop videotaping the application process. Such tactics obviously enhance the applicants' ability to detect and establish discrimination in the hiring process, but an employer may lawfully prohibit them all the same. Indeed, the Act does not create "a right by a job applicant to videotape an employer's applicationinterview process" simply because the videotape would be useful in supporting a later charge of discrimination. Heiliger Electric Corp., supra. Today's decision cannot be squared with these principles.

The majority goes even further, and faults the policies because they "gave each IEC employer member a defense against any allegation of unlawful discrimination." Again, the results of this case disprove the majority's claim. Even if it were true, my colleagues identify no reason why Section 8(a)(1) prohibits nondiscriminatory employer policies simply because they might give the employer a valid defense to an unfair labor practice charge. Employers often adopt lawful policies aimed at minimizing their exposure to hiring discrimination allegations. These include limits on the active date of an

application and limits on volunteering information that would disclose an applicants' protected status. Dilling Mechanical Contractors, Inc., supra (valid policy of discarding applications from nonreferred applicants after 7 days); Jesco, Inc., 347 NLRB 903, 908 (2006) (policy that applications at Federal project covered by affirmative action recordkeeping rules only valid for 30 days and only valid at that site had valid business justification of reducing paperwork and reporting); Boilermakers v. NLRB, 127 F.3d 1300, 1309-1311 (11th Cir. 1997) (no Section 7 right to volunteer union affiliation on application form "in direct contravention of the employer's neutral, nondiscriminatory policy prohibiting extraneous information of any kind").8 Today's decision, if allowed to stand, will strip employers of lawful and legitimate means of protecting themselves from legal liability.

At bottom, the majority appears to fault IEC's policies because they interfere with "Section 7 protected conduct, namely salting." Of course, there is no Section 7 right to engage in all activities that could be labeled "salting" and Board law is clear that many salting tactics are not protected. Toering Electric Co., 351 NLRB 225, 230-231, 233 (2007). See, e.g., Bill's Electric, supra (videotaping application process); Heiliger Electric Corp., supra (same); Exterior Systems, 338 NLRB 677 (2002) (mocking hiring official's Asian accent while soliciting workers to guit their jobs and work for a union contractor); Tann Electric, 331 NLRB 1014, 1018-1019 (2000) (entering an employer's office en masse to apply while videotaping the proceedings). The majority fails to identify a single specific instance in which IEC's policies restrained anyone in the exercise of rights the Act does protect. Instead, they argue that when combined the policies created a "closed" hiring system. I am unpersuaded by my colleagues' apparent belief in a sort of reverse alchemy, through which lawful policies, when combined, are transmuted into a violation of the Act.

⁷ In addition, it is undisputed that some union applicants were hired consistent with these policies. Board law clearly holds that this fact supports a finding that the policies were lawful. *Pollock Electric*, supra, 349 NLRB at 710 fn. 16; *Kanawha Stone*, supra, 334 NLRB at 237 (same). The majority's view that this fact is entitled to "no weight" cannot be reconciled with this precedent.

⁸ I recognize that the court in *Boilermakers v. NLRB*, denied enforcement to the Board's decision finding the nonresponsive information policy inherently destructive of Sec. 7 rights. See *H. B. Zachry Co.*, 319 NLRB 967 (1995), enf. denied in pertinent part sub nom. *Boilermakers v. NLRB*, supra. The Board's theory of violation was that writing "voluntary union organizer" on the application form was Sec. 7 activity much like the wearing of union insignia, and that the employer's policy prohibiting it was therefore unlawful. While I find the court's critique of the Board's position to be persuasive, I need not resolve that issue for the purpose of this decision. Even if Sec. 7 protects an applicant's disclosure of his or her own union affiliation, on the employer's own application form and contrary to the employer's non-discriminatory instructions, there is no basis for arguing that applicants have any Sec. 7 right to either receive or request information about their own applications such as that at issue here.

C. The Majority's Newly-Fashioned Standard is a Radical Departure from any Previously Recognized Theory of Liability

In finding a violation despite the absence of any evidence that these policies were discriminatory on their face or as applied, the majority appears to be reaching towards a disparate impact theory of liability. No such theory exists under the Act. Even if it did, a violation could not be found without considering the employer's business justification for the disputed employment practice. The majority, however, instead imposes strict liability for policies that—in their view—disadvantage union applicants. This is not the law under any other employment statute, and it is certainly not the law under the Act.

The Supreme Court has recognized a disparate impact theory of liability under Title VII of the Civil Rights Act of 1964. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under this standard, employment practices and procedures, even if neutral on their face, violate Title VII despite the absence of discriminatory intent if they operate to exclude a protected class and cannot be justified by business necessity. This standard is consistent with the text of Title VII, which prohibits discrimination in hiring and also makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment" because of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(2).

The Act contains no such prohibition. Therefore, it does not allow a disparate impact theory of liability. *Contractors' Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003), denying enf. to sub nom. *Aztech Electric Co.*, 335 NLRB 260 (2001) ("the Board may not draw support for its decision from the [Title VII] disparate impact line of cases"). A violation of the Act, thus, cannot be predicated solely on the basis that a disputed employer policy has a disparate impact on the employment of union members.

Even if the Title VII disparate impact theory was cognizable under the Act, and it clearly is not, liability still would not attach until employer business justification had been considered. *Griggs v. Duke Power Co.*, supra. The Act likewise requires that legitimate employer interests be considered, regardless of whether the case is decided under Section 8(a)(1) or (3). See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (the Act represents an accommodation between the legitimate interests of employees and employers, and the Board must accommodate these often competing interests with as little interference with one as is consistent with the maintenance of the other); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (Act does not limit the normal exercise

of the right of the employer to select its employees or to discharge them); *ANG Newspapers*, supra (legitimate employer interests must be considered). The majority fails even to pay lip service to this requirement. Despite their protestations to the contrary, by focusing solely on the purported impact on Section 7 rights of IEC's policies, the majority effectively creates a strict liability standard that goes far beyond anything Congress has authorized under Title VII, the Act, or any other law.

D. The Respondents' Statements about these Policies do not Establish that they are Unlawful

In a further effort to support their unprecedented strict liability standard, the majority relies on certain statements made by IEC officials indicating that use of the IEC application service may provide a defense against salting campaigns. Significantly, IEC's comments about its services stress that "it was created for other reasons." The majority cites no instance in which any IEC official stated that the system would prevent the hiring of union supporters as such, and the evidence clearly shows that it did not. Instead, IEC touted the service as a means of avoiding "potential 'salting' problems" and minimizing "our members' exposure to the current 'salting' risk."

Contrary to the majority, these statements do not support a finding that the disputed employment practices were unlawful. First, they confirm the fact that the policies were implemented for lawful and legitimate business reasons—and not as a response to the salting campaign. The majority erroneously gives no weight to this fact. Second, the statements do not state that the purpose or effect of the disputed practices is to prevent union hires; instead they tout them as a means to reduce the risk of salting-related unfair labor practice charges. The majority erroneously equates these statements with opposition to the employment of union members and adherents generally. Board law is to the contrary, as the Board has recognized that salting campaigns may involve activity protected by Section 7, but also may involve the unprotected submission of "applications with no intention of seeking work but rather to generate meritless unfair labor practice charges." Toering Electric Co., 351 NLRB at 230-231. IEC's stated goal of defeating such tactics does not show that the disputed policies had an unlawful intent or effect. In any event, taken as a whole the statements can fairly be characterized as self-serving claims by a voluntary association about the benefits of member-

⁹ I am puzzled by the majority's reliance on IEC's supposed intent inasmuch as they elsewhere disclaim any reliance on a motivational analysis. By its own terms, the majority's analysis appears to depend on the claimed effect of the disputed policies rather than the Respondents' motive for adopting them.

ship. In my view, they are as likely to be mere "puffery" as any other form of advertising. For all of these reasons, these statements have little probative weight as to the actual effect of the IEC policies and do not establish that they were unlawfully motivated.

E. The \$50-Application Fee was Unlawful

In contrast to the other employment policies discussed above, the \$50-application fee was imposed in response to the Union's salting campaign. On its face, the policy was discriminatory, in that it only applied to outside applicants, which included all of the union applicants. Its obvious effect was to discourage outside applicants from applying more often than once a month. Indeed, the union applicants in this case, including the discriminatees, drastically reduced the number of applications they filed after the fee was imposed. This disadvantaged the outside applicants because member employers gave preference to the most recently filed applications in their hiring decisions.

IEC has failed to establish any legitimate business justification for the rule, much less one that would justify its obvious impact on employee Section 7 rights. According to IEC, its member employers were concerned about the cost of the referral program, which was somewhere between \$60,000 and \$100,000 at the time the fee was implemented. Significantly, however, IEC has neither asserted nor shown that the cost of the referral program increased at that time either due to the salting campaign or for any other reason. Nor has IEC established a valid justification for imposing the fee only on multiple applications from outside applicants. According to IEC's brief, it excused laid-off former employees of member contractors from the fee because those contractors supported the application program with their dues. No witness, however, testified to this post hoc rationalization. Moreover, it is belied by IEC's admitted denial of the benefit to former employees who were discharged for cause—member employers' dues paid the fee for these individuals as much as they did for those who were laid off. The pretextual nature of this belated justification further supports a finding that the fee was unlawful. Under all of these circumstances, I would find that the \$50 application fee violated Section 8(a)(3) and (1) as alleged in the complaint. 10

Conclusion

Congress crafted the Act to, inter alia, establish and protect the right of employees to freely choose or reject union representation. In determining whether an employer has infringed that right, however, the Board must in all cases weigh not only the Section 7 right at stake but also any legitimate business justification for its actions established by the employer. Unfortunately, my colleagues fail in that task in today's decision. Instead, the majority would eviscerate lawful, nondiscriminatory hiring practices simply because they allegedly disadvantage union applicants with no consideration whatsoever of the legitimate business purpose for those practices. Though my colleagues fail to acknowledge it, this one-sided rule discards decades of established precedent and cannot be squared with the Act's foundational principles. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber,

Member

NATIONAL LABOR RELATIONS BOARD APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an application referral system for our member contractors that interferes with employees' right to engage in union activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

¹⁰ See generally *Fluor Daniel, Inc.*, 333 NLRB 427, 439–440 (2001), enfd. in part 332 F.3d 961 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005) (hiring policies violated the Act where they were adopted in response to applications by union members and disparately applied); *Norman King Electric*, 334 NLRB 154 (2001) (policy of not accepting applications unlawful where it was implemented in response to union applications and disparately applied); *Masiongale Electrical-Mechanical, Inc.*, 331 NLRB 534, 538–539 (2000), enfd. in pertinent part 323

F.3d 546 (7th Cir. 2003) (employer unlawfully implemented requirement that private investigator interview applicants in response to union applications where policy disparately applied).

WE WILL maintain, for a 2-year period from the date of the Board's Order, written records of the operation of our application referral system, including applications, hiring records, and information sufficient to disclose how employment applications are processed, marked, or segregated, and the basis for each referral or failure to refer an application to an employer seeking applications, and upon request of the Regional Director for Region 16 or his agents, make available for inspection, at all reasonable times, any records relating in any way to the application referral system.

WE WILL, for a 2-year period from the date of the Board's Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the processing and referral of union applicants Ray Rath, Troy Lockwood, and John Gafford, and other self-identified union applicants. Such reports shall include the number of job applications submitted by such applicants, the date of each application, the number of times in which they were referred to member employers, and the names of the member employers to which the applications were referred.

INDEPENDENT ELECTRICAL CONTRACTORS OF HOUSTON, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, support, or use the unlawful application referral system operated by Independent Electrical Contractors of Houston, Inc. (IEC) to hire employees.

WE WILL NOT refuse to hire employees because of their union affiliation or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, within 14 days from the date of this Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

WE WILL make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL maintain, for a 2-year period from the date of the Board's Order, written records of our hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, WE WILL make available for inspection, at all reasonable times, any records relating in any way to our use of IEC's application referral system.

WE WILL, for a 2-year period from the date of the Board's Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.

KENMOR ELECTRIC COMPANY, INC.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, support, or use the unlawful application referral system operated by Independent Electrical Contractors of Houston, Inc. (IEC) to hire employees.

WE WILL NOT refuse to hire employees because of their union affiliation or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, within 14 days from the date of the Board's Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

WE WILL make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL maintain, for a 2-year period from the date of the Board's Order, written records of our hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, WE WILL make available for inspection, at all reasonable times, any records relating in any way to our use of IEC's application referral system.

WE WILL, for a 2-year period from the date of the Board's Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.

H & J ELECTRIC CO.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, support, or use the unlawful application referral system operated by Independent Electrical Contractors of Houston, Inc. (IEC) to hire employees.

WE WILL NOT refuse to hire employees because of their union affiliation or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, within 14 days from the date of the Board's Order, offer employment as journeymen to Ray Rath, Troy Lockwood, and John Gafford or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

WE WILL make Ray Rath, Troy Lockwood, and John Gafford whole for any loss of earnings and other benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to hire Ray Rath, Troy Lockwood, and John Gafford, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL maintain, for a 2-year period from the date of the Board's Order, written records of our hiring of employees, including applications, hiring records, and information sufficient to disclose the source of each hire, and upon the request of the Regional Director for Region 16 or his agents, WE WILL make available for inspection, at all reasonable times, any records relating in any way to our use of IEC's application referral system.

WE WILL, for a 2-year period from the date of the Board's Order, submit quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, concerning the hiring of applicants. Such reports shall include the date and number of job applicants, the names and dates of actual hires, and as to each actual hire, whether the individual was a self-identified union applicant.

LOUIS P. LEE D/B/A L.L. ELECTRIC CO.

Olivia Garcia Boullt, Esq. and Nadine Littles, Esq., for the General Counsel.

Frank L. Carrabba, Esq., of Houston, Texas, for Respondents
Houston Stafford Electric, Inc., Hou-Tex Power, Inc., Louis
F. Lee d/b/a L.L. Electric Co., MH Technologies, Inc., H & J Electric Co., and Independent Electrical Contractors of Houston, Inc.

Tom M. Davis Jr., Esq. (Davis & Shank, P.C.), of Houston, Texas, for Respondent KenMor Electric Company, Inc. Patrick M. Flynn, Esq., of Houston, Texas, for the Charging Party.

DECISION*

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Charges against the Respondents captioned above were filed by International Brotherhood of Electrical Workers, Local Union No. 716, a/w International Brotherhood of Electrical Workers, AFL—CIO (the Union) at various times in 1996 and 1997. 1

After issuance of a complaint and amended complaint, a second amended consolidated complaint issued on October 3, 1997. It alleges that, beginning on various dates and continuing to date, Respondents refused to hire or consider hiring various alleged discriminatees because they assisted the Union and engaged in protected activities. Thus, Respondent MH Technologies allegedly refused to hire Troy Lockwood, Ray Rath, Jack Smith, John Gafford, and Doug Niemeyer. Respondents KenMor Electric, Hou-Tex Power, L.L. Electric, and H & J Electric allegedly refused to hire Troy Lockwood, Ray Rath, and John Gafford, while Respondent Houston Stafford allegedly refused to hire Troy Lockwood and Ray Rath.

In addition, the complaint alleges that Respondent I.E.C. has maintained a discriminatory referral system since January 1996 and thereafter, for the purpose of discouraging employees from assisting the Union and engaging in protected activities.

These matters were heard before me in Houston, Texas, on 23 trial days beginning October 20, 1997, and ending April 15, 1998. Thereafter, the General Counsel, Respondents, and the Charging Party filed briefs. Based upon my observation of the demeanor of the witnesses and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that each Respondent except I.E.C. is engaged in business as a commercial electrical contractor, and is a Texas corporation, with a place of business in Houston, Texas. Respondent KenMor Electric, during the 12 months preceding issuance of the complaint, purchased and received at its Houston, Texas facility goods valued in excess of \$50,000 in states other than the State of Texas. During the same time period, Respondent Houston Stafford performed services valued in excess of \$50,000 in States other than the State of Texas. Respondent MH Technologies during the same time period purchased and received at its Houston, Texas facility products valued in excess of \$50,000 from other enterprises directly engaged in interstate commerce. Respondents Hou-Tex Power, L.L. Electric, and H & J Electric each received goods and materials valued in excess of \$50,000 from enterprises located within the State of Texas, which enterprises had received the goods directly from points outside the State of Texas. The foregoing Respondents admit and I find that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

Respondent I.E.C. is a Texas corporation, which functions as a trade association and provides services to about 122 open-shop electrical contractors as its members. None of them has a contract with the Union, including the foregoing Respondent contractors. Respondent I.E.C. is the Houston chapter of a national trade association of the same name. Officers of Respondent contractors serve on boards and committees of I.E.C. I.E.C. had revenues of \$716,000, comprised of dues from contractor members and fees from an apprenticeship-training program, during the 12 months preceding issuance of the complaint.

One of the services provided to members by I.E.C. is the application-referral service. Applicants for employment by Respondent contractors are directed by some of them to submit their applications to I.E.C. Other contractors use I.E.C.'s referral service as an adjunct to other employment procedures.

Another service is the "shared man" program, whereby an I.E.C. member who is temporarily overstaffed loans an employee to another I.E.C. member for a specified period of time.

Other services provided by the I.E.C. are the apprenticeship program, lobbying, and a continuing education program for electricians. I.E.C. also conducts trade shows, barbecues, and fishing tournaments.

^{*} Corrections have been made according to an errata issued on November 12, 1998.

¹ Houston Stafford Electric, Inc. (Houston Stafford), Case 16–CA–17894; 3-15-1996; KenMor Electric Company, Inc. (KenMor Electric), Case 16–CA–17895, 3-15-1996; MH Technologies, Inc. (MH Technologies), Case 16–CA–18264, 9-30-1996, amended charge (Case 16–CA–18264–2, 11-13-1996; Independent Electrical Contractors of Houston, Inc. (I.E.C.), Case 16–CA–18302–2, 2-13-97; Louis P. Lee d/b/a L.L. Electric Co. (L.L. Electric), Case 16–CA–18595, 4-10-1997; H. &. J. Electric Co. (H. & J Electric), Case 16–CA–18613, 4-17-1997; I.E.C., Case 16–CA–18530, 3-7-1997; I.E.C., Case 16–CA–18595–2, 6-6-1997; LE.C., Case 16–CA–18613–2, 6-6-1997; and Hou-Tex Power, Inc. (Hou-Tex Power), Case 16–CA–18530, 3-6-1997.

The facts establish that I.E.C. is an agent of its contractor members. Applicants for employment at respondent contractors are specifically directed by some of them to I.E.C. for the purpose of filing applications. This manifests to the applicants that I.E.C. is authorized to receive applications on the employer's behalf. I.E.C. is an agent of the contractors under the common-law principles of agency, accepted by the National Labor Relations Board (the Board). Further, the shared man program is operated under the auspices of the I.E.C.

Section 2(2) of the Act provides that "/t/he term 'employer' includes any person acting as an agent of an employer, directly or indirectly. . . ." Since the I.E.C. is an agent of its contractor members, it follows from the statutory language that the I.E.C. is an employer within the meaning of the Act. The Board has asserted jurisdiction over a trade association, as an employer, where its employer-members met the appropriate jurisdictional standards. Associated General Contractors of California, 242 NLRB 891 (1979). Since Respondent Employers herein meet the Board's jurisdictional standards, the Board may appropriately assert jurisdiction over the I.E.C.

II. SUMMARY OF THE EVIDENCE

A. The I.E.C.'s Referral System

The I.E.C. is governed by its board of directors, who are its members. The executive director is Robert Wilkinson and the director of member services is Robert Jones. There are two clerical employees, although there was some change in the persons so employed.

As indicated, applicants for employment are directed by employers to the I.E.C. There they submit their applications, five pages in length, which are checked for omissions by the clerical personnel. The applications are divided into three categories, for journeymen, apprentices, and inexperienced applicants. They are then placed in three racks near the fax machine according to category. Near the end of the day, the applications are sent by fax to the employers who had requested them. About 10 to 15 applications are filed daily. Some members come to the office and examine the applications. They are kept in the racks for 30 days, and are then transferred to a file cabinet for 1 year. Wilkinson testified that they did not have sufficient time or help to keep a record of the employers to whom applications were sent.

The employers do not have identical criteria for hiring. However, all of them stressed recency of application. For this reason, and because of the transfer of the applications to the cabinet after 30 days, the alleged discriminatees, and others, filed numerous applications as appears hereinafter.

There was initially no restriction on the number of applications which could be filed. On September 7, 1997, however, I.E.C. began charging applicants \$50 for each additional application filed during a 30-day period. One application could be filed without charge for each such period, but the \$50 charge was made for each additional application. The I.E.C. cited cost

of the application program as a reason. However, there is an exception to the charge. If the applicant has been laid off by an I.E.C. member during the 30-day period, there is no charge for additional applications.³

The alleged discriminatees repeatedly asked Wilkinson and Jones for the names of the employers to whom their applications had been sent. These requests were routinely denied. Wilkinson testified that he did not have the answers to these questions, and would not respond even if he did have the answers. Further, if an applicant wanted to review his current application, this request was also denied.

B. The Shared Man Program

The shared man program is one which I.E.C. offers to its members. An agreement must be signed. Wilkinson stated that it "minimizes our members' exposure to the current 'salting' risk." A majority of the I.E.C. members, including all of the Respondent Employers herein, have signed agreements to participate in this program. These agreements last for 60 days, and set out the relationship between the "Home Firm" and the "Host Firm." One of the requirements is that the "Host" (borrowing firm) must pay the employee the same current wage rate and "all legal fringes" as those at the "Home" (lending) firm. These benefits do not include medical insurance, and paid holidays and vacations. However, the employee must agree not to take a holiday or vacation during the loan period.⁴ Under this program, employers needing employees simply borrow them from other I.E.C. members. As indicated, all I.E.C. members are nonunion. MH Technologies President Joseph Heiman testified that it was a "great program" for both employers and employees. H & J President Lynn Jones stated that "trading" employees was a matter of "convenience," and avoided the risk of losing employees.

The record shows that the Respondent contractors in this proceeding have utilized the shared man program. MH Technologies President Joseph Heiman testified that an employee available through this program had priority over any other applicant, and the evidence shows that MH Technologies used the program extensively. It hired 98 employees from June 20, 1996, to March 20, 1997, 54 of whom were borrowed under the shared man program.⁵

C. I.E.C. Newsletters

I.E.C. published various newsletters describing its functions and position. In March 1994, it published an article entitled "I.E.C. members can defeat COMET." This article states that employers can develop a "reliable labor pool that members draw from and return to as the work load cycles." Members have developed programs to "defend against this union attack." In March 1996, the I.E.C. newsletter was entitled "Coping with Labor's COMET Campaign . . . develop strategies to combat salting." This article states that "Chapter runs 'hiring hall' to help contractors avoid 'salting' risks. To counter labor's attack on the open shops' skills sources, the Houston chapter and some other I.E.C. affiliates have developed referral procedures.

² Bayou-Medical Applications of Puerto Rico, Inc., 269 NLRB 827 (1984); Allegany Aggregates, Inc., 311 NLRB 1165 (1993); Service Employees Local 87 (West Bay Building Maintenance), 291 NLRB 82 (1988). Sec. 2(13) of the Act is consistent with these principles.

³ GC Exh. 36.

⁴ GC Exh. 31.

⁵ GC Exh. 100.

They advertise on behalf of their members and sign up applicants at various offices."6

I.E.C. Executive Director Wilkinson testified that these views were those of Jon Pollock, past president of the Local I.E.C. and the national I.E.C., and that they are not necessarily the views of the I.E.C.

D. Alleged Discrimination by MH Technologies

The complaint alleges that MH Technologies, commencing September 20, 1996, refused to hire or consider hiring Troy Lockwood, Ray Rath, Doug Niemeyer, Jack Smith, and John Gafford

MH Technologies had four or five projects in 1996, including one called the Tinseltown 24 Theatre project. On about September 18 or 19, 1996, the general contractor of the Tinseltown project informed MH Technologies that the latter had to schedule a weekend of work to make room for another subcontractor. MH Technologies then ordered additional employees from Magnum Staffing, a temporary staffing company, and, on September 20, John Gafford, Jack Smith, and Doug Niemeyer reported to the MH Technologies on referral from Magnum Staffing. They worked from September 20 through 23. Before work and during their lunch hours, they picketed the Company. MH Technologies Foreman Steve Hobbs and a representative of the general contractor asked them the reason, and they replied that the Company did not have a contract with the Union. The employees also handed out literature. Hobbs gave them the Company's no-solicitation rule, to which they replied that they were Magnum Staffing employees. Hobbs disagreedthey worked for MH Technologies. On September 23, Foreman Hobbs told them that they would have to leave the job, because a city ordinance barred referral of journeymen by a temporary staffing agency.

Lockwood and Rath went to the Company on September 20, the day that the other three employees began working on referral from Magnum Staffing, and spoke with the Company Owner Joe Heiman. They stated that they were from the Union, and handed him their business cards. Lockwood and Rath asked Heiman whether he was doing any hiring. Heiman replied that he had done some hiring 2 or 3 weeks before, but was not doing any at that time. Lockwood and Rath told Heiman that they had applications on file with the I.E.C.

After Hobbs told Gafford, Smith, and Niemeyer on September 23 that they had to leave the job, they went to the Company's office together with union organizers Troy Lockwood and Ray Rath and spoke to Superintendent John Burch. Gafford told Burch that they had been asked to leave the job because of a city ordinance, and asked whether they could file

applications and go back to work. Burch told them that they were not "former employees"—one of the Company's priority classifications when hiring. Gafford replied that Hobbs had said they were company employees, but Burch repeated his position. He also said that he did not have any jobs available at the time, and that the best way to get hired was to file an application with the I.E.C. Lockwood replied that they put in applications at the I.E.C. all the time. They asked Burch to call I.E.C. and ask for their applications. He replied that this was not part of the hiring policy.

The applicants then went to I.E.C., asked whether they had current applications, and whether these had been faxed to MH Technologies. A lady replied that this had been done. The applicants spoke with Magnum Staffing, which told them that it was not going to charge MH Technologies for the referrals. Gafford called Burch again on the same day, and told him that he did not have to pay Magnum Staffing. That was all right with Burch. Gafford also told him that I.E.C. claimed it had faxed the applications. Burch asserted that he was not aware of this.

None of these individuals was hired. Lockwood had been a journeyman for 10 years, had a current license, and completed a city of Houston update course in 1997. He is a member of the National Electrical Inspectors Association, and worked with the tools of the trade continuously until 1994, when he became a paid organizer. He continued to do some work thereafter. Lockwood testified that he had not been hired by any of the Respondent Employers or any I.E.C. member.

Gafford had been a journeyman for 21 years, and worked continuously at his trade for 19 years until he became a paid organizer. He has a current license, and has taken the 1997 update course. As indicated, Gafford worked for MH Technologies for 3 days in 1996, and had been working as a journeyman for another employer for 5 weeks at the time of the hearing. He testified that he had not been hired nor had he received an interview from I.E.C. members on or near the dates of his applications.

Rath started in 1981 as an apprentice electrician, and became a journeyman in 1986. He has a current license, and has completed the update course. He worked regularly at his trade until

⁶ GC Exhs. 33, 35.

⁷ Union organizer Rath initiated this by calling the city electrical inspector, for the purpose of changing the three employees from temporary to permanent status.

⁸ In addition to hiring Gafford, Smith, and Niemeyer on September 20, the Company had hired or borrowed a journeyman on September 4, another on September 11, and borrowed an additional journeyman on October 1, and others on October 9, 15, and 16. As indicated MH Technologies hired 98 employees from June 20, 1996, to March 20, 1997, 54 of whom were through the shared man program GC Exh. 100.

⁹ Lockwood filed seven applications prior to October 2, 1996, one on that date, one each in November and December, and numerous applications in 1997. In these applications, Lockwood states that he is an "electrician/organizer," and was formerly employed by an I.E.C. member, that his duties include organizing during nonworktime, and that his status is protected by the Supreme Court. GC Exh. 181(a).

Rath filed seven applications prior to October 4, 1996, one on that date, two later in the year, and numerous applications in 1997. In these applications, Rath lists himself as a union organizer, and had formerly been employed by an I.E.C. member. GC Exh. 183(a).

Gafford filed five applications prior to October 3, 1996, one on that date, two thereafter in 1996, and numerous applications in 1997. GC Exhs. 21–23, 161, 163–167. On these applications, Gafford states that he is an "electrician organizer."

Jack Smith filed three applications prior to October 15, 1996, one on that date, and numerous applications thereafter. He cited union organizers as his references, and listed several former employers where he had been discharged for "organizing and union activities." GC Exhs. 143, 144.

September 1995, when he became a union organizer, and has worked for employers for about 45 days since then. He did not receive any job offers as a result of his applications filed with the I.E.C.

Niemeyer has been a journeyman since 1977. During most of that time he worked for one electrical contractor. Later, he became a traffic signal electrician for the city of Houston.

Jack Smith is a licensed journeyman, has worked in the electrical trade for more than 20 years, and has completed the update requirement. Smith has not received a call from MH Technologies or any other I.E.C. member.

MH Technologies has a hiring policy which lists categories of individuals who are considered in a prescribed sequence. First consideration is given to a qualified individual available through the shared man program. Next, the Company considers current and former employees with good records. The next category includes friends and acquaintances of current employees who have good records. Last are applications through the I.E.C., but preference is given to those who have a favorable reference from another I.E.C. member.¹⁰

As indicated, MH Technologies had four or five projects in September 1996, including the Tinseltown project. From June 20, 1996, until March 29, 1997, it hired, or borrowed under the shared man program, 98 employees. 11 Of these, 21 were journeymen hired or borrowed after September 20, 1996—13 in October alone. 12 Alleged discriminatees Lockwood, Rath, Gafford, Niemeyer, and Smith filed I.E.C. applications less than 30 days prior to these hirings. 13

There are departures from MH Technologies' asserted hiring policy. Terry Barfield was hired as a journeyman on October 16, 1996, allegedly as a former employee—one of the hiring priorities. However, his personnel records contain no evidence that he was a former employee, ¹⁴ and he is not on Respondent's list of rehires. ¹⁵

As indicated, the hiring policy required applicants to have "good records." Shane Scallan was previously employed and discharged on January 11, 1992, for no-shows and arguing with a supervisor, and was marked "not eligible for rehire." Nonetheless, he was rehired on July 3, 1996, and discharged on July 11 because he failed a drug test, lied about his journeyman's license, and talked too much on the phone. At some point he was demoted from \$12.50, the journeyman's scale, to \$11.50, the apprentice scale. ¹⁶

Doug Rosbrough was previously discharged for no-shows, and marked "not eligible for rehire." Nonetheless, he was rehired. Bradley Ethridge was hired on October 1, 1996, fired on March 18, 1997, for attendance and tardiness problems, rehired on April 1, 1997, fired again on May 9, 1997, for the

same reasons as before, rehired again on July 7, 1997, and quit on August 12, 1998. Pete Vasquez was fired on October 24, 1994, for absenteeism and leaving the job without permission. He was rehired as a journeyman on October 15, 1996, with 3 years of experience, less than a month after the alleged discriminatees' visit to the Tinseltown project. Reynaldo Garza was discharged on April 8, 1987, for testing positive for cocaine, was discharged and marked "not eligible for rehire," and was rehired on October 9, 1996, about 2 weeks after the attempts of the alleged discriminatees to obtain employment.

E. Alleged Discrimination by Houston Stafford

1. Houston Stafford's hiring

The complaint alleges that Houston Stafford, on and after January 20, 1996, unlawfully failed to hire or consider hiring Troy Lockwood and Ray Rath.

On January 16, 1996, Houston Stafford's superintendent, Jack Beasley, directed I.E.C. to submit applications, and the latter did so. From January 1 through February 23, 1996, Houston Stafford hired 16 journeymen and 67 apprentices. Raymond Bonifacini was hired as a journeyman during the payroll period ending January 24, 1996. Beasley testified that he hired Bonifacini because of the latter's experience in heavy equipment and motors. Bonafacini's I.E.C. application does not show such experience, or that he was currently employed. Beasley testified that he worked as an ordinary electrician.

Hector Bethancourt was hired as a journeyman during the payroll period ending January 31, 1996. ²⁴ Beasley testified that Bethancourt did not have a license, and his application shows that his experience was basically in apartment maintenance. ²⁵ Rick Stephens was hired according to the testimony of Beasley. His application shows that he worked as a journeyman for 1 month in early 1991, as an electrician for a few months in 1995, and for 3 years as an installer of signs. It is unclear whether he has a journeyman's license. ²⁶ Renwick Skelton was hired as a journeyman according to Beasley. His application shows that he worked as an apprentice from December 1994 to May 1995, and as a purchasing agent thereafter to January 1996. It does not show that he had a journeyman's license. ²⁷

Lance Sain was hired as a journeyman during the pay period expiring January 31, 1996.²⁸ He worked as a journeyman from 1986 to 1992, and thereafter was the owner of an electric service company, running residential and commercial service trucks. His Houston license had expired.²⁹ Raymond Mendiola

¹⁰ GC Exh. 98.

¹¹ GC Exh. 100.

¹² Ibid. The employee's classification as journeyman is indicated by the letter "J" on the application.

¹³ GC Exhs. 181(h), (i), and (j); 183(h), (i), and (j); 163, 164, 165; 143, and 144.

¹⁴ GC Exhs. 105(d) and 100.

¹⁵ GC Exh. 121(a).

¹⁶ GC Exh. 121(b).

¹⁷ GC Exh. 121(i).

¹⁸ GC Exh. 121(c).

¹⁹ GC Exh. 121(e).

²⁰ GC Exh. 121(f).

²¹ GC Exhs. 151–158.

²² GC Exh. 155.

²³ GC Exh. 160.

²⁴ GC Exh. 156. Although Bethancourt was hired at an hourly rate of \$10, his application was in a group identified by Houston Stafford as journeymen (GC Exh. 90(h).

²⁵ GC Exh. 90(h).

²⁶ GC Exh. 90(j).

²⁷ GC Exh. 90(n).

²⁸ GC Exhs. 151–159.

²⁹ GC Exh. 90A.

was hired as a journeyman during the pay period expiring January 24, 1996.³⁰ His application shows prior experience as an apprentice, but none as a journeyman.³¹ The applications of Steven Gardner³² and Jesse Anderson,³³ both of whom were hired as journeymen, do not show that they are licensed journeymen.

Robert Hale was hired as a journeyman on February 9,³⁴ on the basis of a Houston Stafford application. Beasley asserted that the reason was that Hale was experienced in motor controls. Rath and Lockwood, however, testified that experience with motor controls is a routine element of a journeyman's expertise. Hale had been a union member for about 5 years, but did not reveal this to the Employer.

2. The applications of Troy Lockwood and Ray Rath

Lockwood and Rath applied at the I.E.C. almost every month in 1996.³⁵ As indicated, the applications showed that they were union organizers. As previously indicated, both had current licenses. Rath had about 10 years experience as journeyman. In addition, he had worked about 3 months for Houston Stafford in 1994, on referral from a temporary agency.

Houston Stafford Superintendent Beasley denied that the Company received I.E.C. applications from Lockwood or Rath in January, but admitted that it received one from Lockwood on February 8 and one from Rath on February 14. They were not hired. The reason, Superintendent Beasley testified, was the asserted fact that Houston Stafford was not hiring at the time.

From January 10, 1996, to June 13, Houston Stafford hired 17 journeymen, including 4 in January. The Company also hired numerous apprentices. 37

3. Factual analysis

Lockwood's and Rath's I.E.C. applications in early January were filed less than 2 weeks prior to Beasley's January 16, 1996 direction to I.E.C. to submit applications. Houston Stafford received such applications, and hired employees pursuant to them in January. Beasley admitted receiving Lockwood's and Rath's February applications, but denied receiving their January applications. Lockwood's and Rath's January applications were within the 30-day period prior to Beasley's request, which I.E.C. considers as current, and Respondent has not shown any reason why they would not have been submitted together with the other applications. I do not credit Beasley's testimony, and find that Houston Stafford received Lockwood's and Rath's applications filed in January.

Beasley's testimony that the reason it did not hire Lockwood and Rath was the asserted fact that it was not hiring at the time is contradicted by the documentary evidence of Houston Stafford's hiring. Respondent's asserted policy requiring the hiring of applicants with "good records" was not followed, considering the records of the applicants whom it did hire. Finally, it is obvious that Lockwood's and Rath's applications demonstrated qualifications superior to many of the applicants whom the Company did hire.

F. Alleged Discrimination by KenMor Electric

1. KenMor Electric's hiring policy

The complaint alleges that KenMor Electric unlawfully refused to hire or consider hiring Troy Lockwood, Ray Rath, and John Gafford on and after January 9, 1996.

KenMor President Karl Kennard testified that the Company uses the I.E.C. as its exclusive source for applicants. Kennard averred that KenMor is signatory to the shared man program, but never uses it. However, General Superintendent Gene Kuhn testified that the Company did use the program in 1996 and 1997.

Superintendent Kuhn requests from time to time that I.E.C. send him all the applications it has on file. He assumes that they send him everything that is current. I.E.C. keeps sending applications until it gets an order from Kuhn to stop. Kuhn keeps no record of his start or stop orders. He keeps applications active for 30 days, and reviews these whenever he is hiring. KenMor hired 43 journeymen from January 9, 1996, to January 5, 1998, 15 from January 9 to March 12, 1996.³⁸

2. The alleged discriminatees' applications

Supplementing the listing given above,³⁹ Troy Lockwood filed a total of 72 applications between January 9, 1996, and September 8, 1997, when I.E.C. started its \$50 charge for more than one application in 30 days.⁴⁰

Supplementing the listings given above, ⁴¹ Ray Rath filed 80 applications between January 8, 1996, and September 8, 1997, when I.E.C. started charging \$50 for extra applications. ⁴²

Supplementing the lists given above, ⁴³ John Gafford filed 85 applications from February 13, 1966, until September 8, 1997, when the \$50 charges began. ⁴⁴

³⁰ GC Exhs. 151–159.

³¹ GC Exh. 90G.

³² GC Exh. 90M.

³³ GC Exh. 90P.

³⁴ GC Exhs. 132, 151-159.

³⁵ Rath's applications were dated January 8, February 13, March 12, April 3, June 10, July 10, September 3, October 4 and 30, and December 4, all in 1996. GC Exh. 183.

³⁶ GC Exhs. 90(a-q).

³⁷ GC Exhs. 151, 152, 154–158.

³⁸ GC Exhs. 53, 54, and 124; KenMor Exhs 23B(1)–12C(23). The hiring dates in 1996 were 1-9 and 22; 2-6, 8, 12, 17, 20, 23, and 26(2); 3-1, 4, 7, 11, and 12; 8-5(2), 9-6, 24, and 30, 10-21, and 12-16. The hiring dates in 1997 were 1-1, 13, 14, and 16, 2-26, 3-12, 4-14, and 23; 6-5and 19; 7-30, 8-1 and 7(2); 9-2 and 16, 10-19, 11-5, 12-22; and 1-5 in 1998.

³⁹ Supra, fn. 9.

⁴⁰ The application for dates for 1996 were 1-9, 2-8, 3-12, 4-30, 6-10, 7-10, 10-2, 11-4, and 12-4. The applications for 1997 were one on January 3, 12 in February, 15 in March, 10 in April, 9 in July, 9 in August, and 5 in September, GC Exhs. 3–10.

⁴¹ Supra, fn. 9.

⁴² The applications for 1996 were dated 1–8, 2–13, 3–12, 4–3, 6–10, 7–10, 9–3, 10–4, 10–30, and 12–4. The applications for 1997 were one on January 3, 11 in February, 14 in March, 9 in April, 6 in June, 14 in July, 11 in August, and 5 in September. GC Exhs. 183, 20(a), 21–28.

⁴³ Supra, fn. 9.

⁴⁴ The applications for 1996 were dated 2–13, 3–12, 4–3, 5–8, 6–10, 10–3 and 30, and 12–6. There was one application on January 6, 1997, 10 in February, 15 in March, 12 in April, 4 in June, 16 in July, 15 in August, and 4 in September. GC Exhs. 11(a), 12, 14(c)–(1); 13(d)–(k), 14(a)–(s); 15(a)–(o), 16(a)–(u), 17(a)–(p), 18(a)–(o), 19(a)–(d).

3. KenMor's response to the discriminatees' applications

a. Troy Lockwood

Lockwood worked for KenMor in the late 1980s. He did not have a journeyman's license when he began, but acquired one shortly thereafter. Lockwood replied to a newspaper ad by KenMor, and was interviewed by Kuhn. "Well, you're that union guy," Kuhn said to Lockwood. The latter replied that he needed the job, and was hired after being required to sign a warning that he would not engage in union activities, according to his credible testimony.

As indicated, Lockwood's first I.E.C. application was filed on January 9, 1996. Superintendent Kuhn acknowledged receiving an I.E.C. application from Lockwood early in 1996. The I.E.C. did not send applications more than 30 days old. Kuhn noted that Lockwood's application stated that he was an "organizer," and that the reason for his leaving his last employer was to organize nonunion workers. Kuhn asserted that he took the application to Company President Kennard. He would not have done so if Lockwood's application had not stated that he was a union organizer. This was the first time that he had taken an application to Kennard. The latter replied that Kuhn should treat Lockwood the same way that he would treat any other applicant. KenMor received further applications from Lockwood. 46

KenMor did not hire Lockwood. Kennard wrote a letter to the Board on March 26, 1996, stating that it was not hiring Lockwood because he did not have any recent electrical experience. At the hearing, Kennard stated that he did not hire Lockwood because he had a poor work record, other applicants were more qualified, and Lockwood had not worked at the electrical trade for over 2-1/2 years. Lockwood's qualifications are stated above in section D. His record shows that he did traffic signal work for the city of Houston, but Kuhn gave him no credit for this.

The General Counsel points to the fact that Lockwood completed a city of Houston update course in 1997, and that I.E.C. Director Robert Wilkinson testified in a prior case that any journeyman taking this course could renew his license and work without further training. *Pollock Electric, Inc.*, JD(ATL)-50-98, ALJD slip op. 7. The I.E.C. was not a respondent in that proceeding, but Wilkinson testified on behalf of respondent therein, Pollock Electric. I take judicial notice of Wilkinson's testimony in that proceeding.⁴⁸

b. John Gafford

Gafford's first application was filed on February 13, 1996, and was followed by many applications thereafter. ⁴⁹ Superintendent Kuhn testified that he had seen numerous applications

from Gafford, but he could not recall the date of the first application. Respondent contended that it did not have any copies of applications prior to July 1996. The first one indicated by its records is dated October 30, 1996. There are company records of many applications from Gafford thereafter. Superintendent Kuhn stated that KenMor did not hire Gafford because his application showed "very little work experience." Kuhn noted that Gafford's work from about 1993 to 1995 consisted of traffic signal work for the city of Houston, but that was not what he "was hiring for." Gafford's more recent applications showed some work with commercial contractors, but "once again, at IBEW, it's electrician/organizer." Gafford's qualifications are shown above in section D.

c. Ray Rath

Rath's first application was filed on January 8, 1996, with many applications thereafter. Superintendent Kuhn could not recall whether he saw an application from Rath early in 1996, but acknowledged that he did see numerous applications. Rath's application was also referred by Kuhn to KenMor President Kennard. The latter testified that he would have had no reason to review this application if it had not stated that Rath was a union organizer.

KenMor did not hire Rath. Kennard testified that the reason was that Rath had a "very spotty work record," had been terminated on his last three jobs, and had no recent education.

4. Qualifications of employees hired by KenMor

Shane Scallan had worked for KenMor prior to 1996, but had been suspended after an accident and failing a drug test. He filed an application on February 5, 1996. In it he denied having worked previously for KenMor. 53 Nonetheless, he was rehired on February 8, 1996, and Superintendent Kuhn explained that the Company extended support to employees who underwent company rehabilitation programs, despite Scallan's denial that he had ever worked for the Company. Kuhn further averred that "the rehab didn't take," and that Scallan "lasted" until about December 1997.

Neil Howland, a union member, filed two applications, with the I.E.C., the first on February 6, 1998, and the second on March 2.⁵⁴ He did not reveal his union membership. In his second application, at Troy Lockwood's suggestion, he stated that his current employer was Amway, and that he was doing sales work. In fact, Howland had never worked for Amway. He credibly testified that he was interviewed for KenMor by Tim Dunlap, who discussed his supposed Amway job with him. Thereafter, a few days later, Howland was hired. He testified that Amway does not employ electricians. He asked for any hourly rate of \$16. Dunlap thought it was a little high, but said he was worth it.

KenMor's asserted requirement of "recency" of experience was not rigorously followed. Malcolm Gilbert was hired on

⁴⁵ Supra, fn. 40.

⁴⁶ GC Exh. 125; testimony of Kennard.

⁴⁷ GC Exh. 55.

⁴⁸ Bluebonnet Express, 271 NLRB 433, 440 (1984); Laborers Local 13 (California Cartage Co.), 215 NLRB 541, 542 (1974); Teamsters Local 901 (Hotel La Concha), 193 NLRB 591 fn. 1 (1971); Jones on Evidence, 6th Ed. (1972), vol. 2, § 9:23, et seq.; Wigmore on Evidence, Chadbourn Ed., vol. 4, § 1325, et seq.

⁴⁹ Supra, fn. 44.

⁵⁰ GC Exh. 38(d).

⁵¹ GC Exhs. 39(0), 43(a) and (q); 44 (13 applications); 45 (19 applications); and 50 (18 applications).

⁵² Supra, fn. 42.

⁵³ KenMor Exh. 23(c)(19).

⁵⁴ KenMor Exh. 23D(4).

February 23, 1996.⁵⁵ His application and Kuhn's testimony show that he had not worked as an electrician since October 1995.⁵⁶ He was not a prior KenMor employee.⁵⁷ Roy Langerhaus had previously worked for KenMor, and his most recent employer was Brown & Root. This employment ended in August 1996, and he was hired by KenMor on February 26, 1997, without any intervening work.⁵⁸ David Herrod was hired on September 2, 1997.⁵⁹ His application shows that he had not worked as an electrician for about 6 months.⁶⁰ He was not a prior KenMor employee.⁶¹

As shown above, Lockwood, Rath, and Gafford had been journeymen for 10, 11, and 21 years, respectively, and completed their updated education. KenMor hired five employees as journeymen with not more than 3 years experience in that position. ⁶²

As noted above, KenMor gave no credit to Lockwood or Gafford for traffic signal work, since it was "not hiring for that." However, a KenMor newsletter in the fall of 1995 states that a crew of KenMor employees was getting started for a Metro Traffic Signal project, and a later newsletter states that the Company had traffic signal projects at 57 intersections plus 17 miles of inner duct and fiber optic cable to install. This was the second highest dollar volume job in the firm's history. 63

KenMor asserted a preference for applicants with "commercial" rather than "industrial" experience, and faulted Gafford's application because it did not list any "commercial" experience. However, Kuhn agreed that an experienced electrician would have both commercial and industrial experience, and that the latter was more physically demanding work. KenMor hired several employees whose experience, Kuhn agreed, was mostly industrial. 64

5. Examination of KenMor's OSHA logs

KenMor employee Mark Brown signed a letter to KenMor requesting that it allow Lockwood to look at the Company's OSHA logs for a job on which Brown was working. Lockwood and Rath went to KenMor in late 1996 or early 1997 with the letter, but Kennard, Kuhn, and another executive ordered him to leave and threatened to call the police. Lockwood left the letter on the counter. He returned a week or two later, and Kennard said that he had written Brown telling him to write another KenMor executive and set up an interview to examine the logs. He again ordered Lockwood to leave.

Kennard returned Brown's letter to Lockwood on January 6, 1997, saying that he had not read it because he wanted no communication with Lockwood. Kennard later wrote Brown

saying that he could see the logs. Lockwood made an appointment with a KenMor executive and saw the logs. He saw nothing of significance.

6. The barbecue

I.E.C. conducted a barbecue in April 1997 which was open to I.E.C. members, employees of members, and their guests. John Rogers was then an employee of Pollock Electric, an I.E.C. member. He invited Lockwood to come with him as his guest. Robert Jones, an I.E.C. official, confronted Lockwood and demanded to know who had brought him to the barbecue. Lockwood took Jones to Rogers, whereupon Jones became angry. During the barbecue, KenMor President Kennard made a gesture with his finger toward Lockwood, which the General Counsel characterizes as obscene.

7. Factual analysis

It is obvious that KenMor hired numerous journeymen at times when it had applications on hand from Lockwood, Rath, and Gafford. From the fact that KenMor uses I.E.C. as its exclusive source for applications, and hired numerous journeymen beginning in January 1996, I conclude that it received Rath's, Lockwood's, and Gafford's applications, dated January 8 and 9, and February 13, 1996, respectively.

Respondent's witnesses gave various reasons for not hiring these applicants. Company President Kennard stated that Lockwood did not have recent electrical experience, and that Rath had a "very spotty work record," while supervisor Kuhn averred that Gafford had "very little work experience." He gave no credit for Gafford's traffic signal experience, despite the fact that the Company's newsletter shows that it had extensive work of that nature. Kuhn faulted Gafford for having industrial rather than commercial experience, despite the fact that the Company hired numerous journeymen with predominately industrial experience.

Kennard claimed that the applicants whom the Company did hire had qualifications superior to those of the alleged discriminatees. A review of Scallan's work history does not support this contention. KenMor hired Malcolm Gilbert, Roy Langerhaus, and David Herrod, despite significant lapses in employment prior to the time KenMor hired them. The case of Neil Howland is ironic. He was a union member who concealed his union membership, and said that his current employer was Amway, who had no electricians, for whom he did sales work. Nonetheless, he was hired by KenMor as a journeyman electrician.

I conclude that these discrepancies nullify KenMor's claim that alleged lack of "recency" of employment was the reason it did not hire Lockwood, Rath, and Gafford. 65

I also conclude that KenMor's requirement that Lockwood had to sign a warning in the late 1980s that he would not engage in union activity as a condition of being hired then, the Company's reluctance to let Lockwood examine its OSHA

⁵⁵ GC Exhs 53, 54, 124.

⁵⁶ KenMor Exh. 23B(6).

⁵⁷ GC Exh. 124.

⁵⁸ GC Exhs. 53, 54, 124.

⁵⁹ GC Exhs. 53, 54, 124.

⁶⁰ KenMor Exh. 23C(17).

⁶¹ GC Exh. 124.

⁶² Robert Crabb, Joe McCune, Keith Hay, Rockford Bass, and David Vercher, GC Exhs. 53, 43, 124. KenMor Exhs. 23B(2), B(3), B(4), B(5), and B(7).

⁶³ KenMor Exh. 27.

⁶⁴ Neil Howland, John McCune, Nicholas Alvarenga, and Robert Crabb, KenMor Exhs. 23D(4), B(3), C(14), and B(2).

⁶⁵ Although I have taken judicial notice of the testimony of Wilkinson concerning the qualifying effect of the alleged discriminatees' updated education in 1997, I need not rely upon Wilkinson's testimony, because of the contradictions in KenMor's evidence.

logs, and the incidents at the 1997 barbecue constitute evidence of antiunion animus.

G. Alleged Discrimination by Hou-Tex Power

1. The evidence

The complaint alleges that Hou-Tex Power on February 25, 1997, unlawfully refused to hire or consider hiring Troy Lockwood, Ray Rath, and John Gafford. Lockwood and Rath had previously applied at Hou-Tex in 1995 when they were interviewed by Hou-Tex Supervisor Fred Cataldo. According to Rath, they filed applications and discussed the Union with Cataldo. The discussion was friendly, according to Rath. He left the interview believing that Hou-Tex might even sign an agreement with the Union. However, Hou-Tex Owner James Cochran testified that Rath was rejected because he was "extremely rude and obnoxious" during the interview, and that Lockwood was turned down because one of his references did not know him. Cataldo did not testify.

Hou-Tex's hiring policy did not require an I.E.C. application—the latter was merely one source of its employees. Applicants were required to file applications at the Hou-Tex office. Hou-Tex considered past employment, references, abilities, and job experience. Its written policy does not mention the I.E.C. as a source of applications.⁶⁶

On February 24, 1997, Lockwood, Rath, and Gafford submitted applications at the I.E.C.⁶⁷ As always, their applications indicated that they were union organizers. They had previously applied on 7 other days in February.

On February 24, Cochran called the I.E.C. and requested their "most recent" applications. He received about 15 applications by fax on the same day. One of these was from John Rogers, a union member who did not reveal his affiliation. He was hired as a journeyman on February 26.⁶⁸ Cochran also hired Alfredo Elizondo. He is listed on Hou-Tex payroll records as an apprentice.⁶⁹ However, his application shows that he was a journeyman,⁷⁰ and the General Counsel so argues. Rudy Kirchner was hired in March, and Cochran asserted that he was rehired as an apprentice. However, Hou-Tex records list Kirchner as a journeyman.⁷¹ In addition, according to Cochran, he borrowed employees in 1997 under the shared man program and paid them the higher wages they earned at the lending employer.

Cochran testified that he did not recall receiving the February 24 applications of Lockwood, Rath, and Gafford. About 10 days later, the three applicants visited Cochran in his office, said that they were referred by current employee John Rogers, and asked for employment. Cochran replied that they would have to call for an appointment. Lockwood asked for an appointment at that time, but Cochran replied that they had to leave and file applications at the I.E.C.

The three applicants then went to I.E.C. and filled out new applications. The Lockwood called Cochran and asked for an appointment. Cochran replied that Lockwood had applied earlier, and that one of his references, Larry Stevenson, assertedly said that he did not know Lockwood—according to Fred Cataldo. Lockwood disputed this, and asked whether Cochran had called his other references. Cochran replied that he had not done so. As indicated, Cataldo did not testify.

Rath then spoke with Cochran. The latter told him that Cataldo had related to Cochran in 1995, at the time of Rath's prior application, that Rath was not the type of person the Company should have to represent it.

Gafford also spoke with Cochran after applying at the I.E.C., and obtained an appointment with him for the following morning. He met with Cochran and filled out an application. ⁷³ He listed work for Amtech in December 1995, H & J Electric in March 1996, and MH Technologies in September 1996 (Magnum Staffing). Cochran told him that he would check his references and call him later. Gafford called several times thereafter, but Cochran replied that he had a job cancellation and had to lay people off. He did not hire Gafford.

After the March 4 interview, Cochran called Cataldo, who assertedly produced the 1995 applications, despite Cochran's practice of throwing away the applications of rejected applicants. These applications were not produced in evidence and, as indicated, Cataldo did not testify. Cochran declared that it was not until March 1997 that Cataldo told him that he had interviewed Lockwood and Rath in 1995 or that any union organizer had been rude. After the March 4 interview, with Cochran, the three applicants walked through a job manned by Hou-Tex and passed out authorization cards.

Within a week after the March 4 visit, Cochran went to the I.E.C. office, and looked over the applications of the three applicants. He continued to reject them on the previously asserted ground that Lockwood had falsified his application in 1995, and that Rath had been rude and obnoxious. Gafford's records showed gaps in his employment, and he had worked for only three electrical contractors between December 1995 and September 1996.

With respect to the qualifications of the employees Hou-Tex did hire John Rogers' application asserts 7 years of experience, but his application does not list a current employer. He claimed that he had worked for one employer as a journeyman, and for two others as an apprentice, but gave no dates of this work. There is no evidence as to whether his work was commercial or industrial. He had Elizondo's application asserts that he had 14 years of experience. Only one employer is listed, where Elizondo worked as "journeyman, help, service maintenance, construction," for about 11 years prior to December 1996. How much of this was journeyman work is not indicated, and there is no evidence whether it was commercial or industrial.

⁶⁶ GC Exh. 91.

⁶⁷ GC Exhs. 3(h), 21(i), 168.

⁶⁸ GC Exhs. 92, 129(6).

⁶⁹ GC Exhs. 127(i), 129(ff).

⁷⁰ GC Exh. 94.

⁷¹ GC Exh. 127(p-u).

⁷² GC Exhs. 169, 4B, 187B.

 $^{^{73}}$ GC Exh. 96. Gafford mistakenly put the date of April 4, 1997, on the application.

⁷⁴ GC Exh. 92.

⁷⁵ GC Exh. 94.

2. Factual analysis

Cochran's asserted reasons for rejecting the applicants' applications are based almost entirely on alleged assertions by a missing witness, Fred Cataldo. He was available for Cochran after the March 4 interview, but was not available for crossexamination at the hearing. I infer that, if called as a witness, Cataldo's testimony would have been adverse to the position asserted by Hou-Tex. Ready-Mix Concrete Co. v. NLRB, 81 F.3d, 1546 (10th Cir. 1996.) Rath was a believable witness, and I credit his description of the 1995 interview with Cataldo, i.e., that it was friendly.

There is no doubt that the alleged discriminatees filed numerous applications with the I.E.C., including those on February 24. Since Cochran on that day called for recent applications, and received 15 of them, I infer that Lockwood's, Rath's, and Gafford's were also received. In any event, about 10 days later, they went to Cochran's office and requested employment. Cochran's response, that they had to file new applications at I.E.C., was contrary to his policy of receiving applications on occasion directly at his office. Nonetheless, the applicants complied, but Cochran refused the requests of Lockwood and Rath based upon his hearsay testimony about statements by Cataldo. Although he granted an interview with Gafford, he did not hire him. His asserted reason—Gafford's lack of qualifications—is not credible. The applications of Rogers and Elizondo, whom Cochran hired, do not demonstrate qualifications equal to those of the Gafford.

H. Alleged Discrimination by H & J Electric

1. The evidence

The complaint alleges that H & J Electric on March 25, 1997, unlawfully refused to hire or consider hiring Troy Lockwood, John Gafford, and Ray Rath.

H & J Electric's hiring policy depends on referrals from other employees, relatives, close friends, customers, and newspaper ads, according to Company President Lynn Jones. Sometimes the Company requires referrals to file applications with the I.E.C., according to service Superintendent Andy Majors.

One of the Company's projects was the Quala construction project, which ended up with 20 to 25 employees. On March 17, Project Manager Lance Jones determined that he was in need of journeymen, and called I.E.C. for applications going back 2 or 3 days. Jones testified that he received applications from I.E.C., including one from Rath, and, he believed, John Gafford, although he did not recall receiving one from Lockwood

Lockwood filed an I.E.C. application on March 17, showing 10 years' experience as a journeyman, 2 years as a foreman, electrical work putting in a computer circuit for a school, work on a lighting and retrofit job, and IBEW apprenticeship training. He listed his current employer as the IBEW, and his job as electrician/organizer. 76 Lockwood filed numerous applications before and after this date.

Gafford filed an application on March 17 for a job as journeyman, foreman, or estimator. He listed apprenticeship train-

ing and work at MH Technologies as an electrician leadman working from prints and gathering material for employees. He also listed work for H & J Electric as an electrician/foreman outlining work for employees, and Amtech as a recent employer for whom he did retrofit work and made sure that the men understood the work.⁷⁷ Gafford filed numerous applications before and after this date.

Ray Rath filed an application on March 17 for apprentice, journeyman, foreman, or leadman positions. He listed 15 years of experience, with B&L Tech and H & J Electric itself as prior employers. He had previously worked with Lance Jones at H & J in 1982 as an apprentice.⁷⁸ Rath filed numerous applications before and after this date.

Lance Jones asserted that he wanted journeymen with cable tray and rigid pipe experience. The only journeyman he selected from the I.E.C. applications was Todd Hebert, whose application showed this experience.⁷⁹ Jones contended that it would take a journeyman 2 weeks to become skilled in cable tray, and 2 years for rigid pipe. However, Lockwood, Gafford, and Rath testified that any experienced journeyman can do this

Jones needed more journeymen for the Quala job, and turned to a temporary employment agency, Link Staffing. He told Link Staffing what he wanted, but did not interview the employees until they were already on the job. He received no preliminary statement of their qualifications from the agency. Jones did not compare their skills with those manifested on the applications of Lockwood, Rath, and Gafford. He simply ordered two journeymen a day from Link Staffing, but did not always receive the same employees. He sent two of them back as unqualified. Jones' testimony, H & J's records, and Link Staffing's billings show that from March 30 to May 4, 1997, H & J hired eight temporary journeymen from Link Staffing. 80 Link Staffing's charge was \$22.50 per hour for journeyman, whereas H & J's scale was \$14 to \$15. Although Link Staffing's rate included payment of benefits, and H & J had to pay these to its own employees, H & J Project Manager Scott Jones agreed that it would have been cheaper for H & J to use its own employees.

2. Factual analysis

Lance Jones' testimony shows that H & J received Rath's applications, and since Lockwood's and Gafford's were filed on the same date it is highly probable that the latter two were included in the batch sent over by I.E.C. Jones partially admitted receiving Gafford's. I conclude that all three were sent to Jones. The evidence also shows that H & J hired temporary employees from Link Staffing without knowing their qualifications, including expertise in cable tray and rigid pipe.

⁷⁶ GC Exh. 4(j).

⁷⁷ GC Exh. 174.

⁷⁸ GC Exh. 187(h).

⁷⁹ GC Exh. 118.

⁸⁰ Randy Trevino, Javier Guevata, Joe Perez, Katherine Moore, Danny Gregory, Thomas Caver, and Eric Cole. The Link Staffing invoices show the project name or number for these individuals. GC Exhs. 120(b)-(q).

I. Alleged Discrimination by L. L. Electric

1. The evidence

The complaint alleges that beginning January 1, 1997, L.L. Electric unlawfully refused to hire or consider hiring Troy Lockwood, John Gafford, and Ray Rath.

L.L. Electric's president, Louis Lee, does most of the hiring. He looks first for rehires, then referrals, next the shared man program, and finally the I.E.C. He does not rely entirely on I.E.C. application being faxed, but normally goes to I.E.C. and examines them himself. After "job meetings" on Tuesday, Lee and his staff determine whether they need any more employees. If needed, Lee goes to the I.E.C., and looks for applications, preferably those not more than two or 3 days old.

L.L. Electric records show that, utilizing I.E.C. applications it hired as journeymen Mike Walling on February 14, 1997, and John Rogers on March 31, 1997. In addition, it hired Roy Rodriguez as a journeyman on February 7, 1997. Representations of the state of the

Respondent also hired Shane Scallan on February 10. It contends that he was hired as an apprentice. However, his applications show that he had been working as a journeyman, 83 and he was hired at an hourly rate of \$13, higher than that paid to journeymen Roy Rodriguez and equal to that of John Rogers.

Respondent hired Mike Walling on February 14, and argues that he was hired as an apprentice, because he was unlicensed as a journeyman. However, Respondent paid Walling \$13.75 hourly, the highest rate of any employee hired for the 6 months following December 27, 1996.⁸⁴ In addition, L.L. Electric hired numerous apprentices through the I.E.C. in 1997.⁸⁵

The evidence shows that the alleged discriminatees filed applications on or a few days prior to the date that Lee hired journeymen—presumably after examining I.E.C.'s rack of journeyman applications. Thus, Mike Walling was hired on February 14, and was paid at the highest hourly rate. ⁸⁶ On the prior date, February 13, Troy Lockwood and Ray Rath filed applications, ⁸⁷ while Gafford filed applications on the February 12, 13, and 14. ⁸⁸

Respondent hired Jeff Walt on March 20. Although he is listed as an apprentice, his pay rate was \$13, equal to that of journeyman Shane Scallan, and higher than that of journeyman Roy Rodriguez. ⁸⁹ Lockwood, Rath, and Gafford filed applications on March 18, 19, and 20. ⁹⁰ John Roger's was hired as a journeyman on March 31. On the same date Lockwood, Rath, and Gafford filed applications. ⁹¹

L.L. Electric President Lee agreed that he needed apprentices in March, but denied that he needed journeymen or that he hired any. However, he agreed that he went to the I.E.C., examined John Rogers' application, and hired him as a journeyman on March 31. Lee denied seeing the applications of Lockwood, Rath, or Gafford at this time although he recollected seeing applications from them "sometime" in the past, faxed over by I.E.C. Lee averred that he "borrowed" a journeyman from another company, but "didn't need him." Lee also contended that he did not need John Rogers.

2. Factual analysis

The documentary evidence is undisputed that Lockwood, Rath, and Gafford filed I.E.C. application a few days before Lee visited the I.E.C., examined the applications, and hired Rogers. The same is true concerning the hiring of Mike Walling and Jeff Walt—the alleged discriminatees filed applications a few days before these events. In fact, they filed a plethora of applications in 1997, and did not stop until I.E.C. imposed its \$50 charge in September.

I do not credit Respondent's position that Walling and Walt were hired as apprentices—their pay scales show that they were journeymen. It is highly unlikely that Lee, who went to the I.E.C. when he needed journeymen and examined their applications, did not see the applications of the alleged discriminatees. I conclude that Lee in fact did see Lockwood's, Rath's, and Gafford's applications.

III. LEGAL CONCLUSIONS

A. Respondent I.E.C.'s Alleged Discriminator Hiring System

1. Background

The evidence shows that the activities of I.E.C. and its members are closely integrated, at least as far as the hiring of employees is concerned. However, the complaint separately alleges that I.E.C. maintains a discriminatory hiring system. It is clear that I.E.C., as the agent of its members, receives applications from applicants, and transmits them to its members. In one of its publications, I.E.C. stated that it had developed "referral procedures." Although it is the employer, not I.E.C., that makes the ultimate hiring decision, this is influenced significantly by the manner in which I.E.C. transmits the referrals. As argued by the General Counsel, several of I.E.C.'s practices tend to exclude union members from consideration for employment, and are therefore unlawful.

2. The shared man program

The evidence shows that all I.E.C. members are nonunion. Although this fact does not necessarily exclude the possibility that one employee of an I.E.C. employer might secretly be a union member, it is highly unlikely that employees loaned from one employer to another fall into this category. Employees of union firms, who are not I.E.C. members, obviously cannot participate. I.E.C. Director Wilkinson advertised the program as "minimizing" members' exposure to the "salting risk." Accordingly, the shared man program effectively excludes union members from being hired under that program.

⁸¹ GC Exhs. 135(a), 137, 138, 139, 141.

⁸² GC Exh. 135(a).

⁸³ GC Exh. 139; L.L. Exh. 4.

⁸⁴ GC Exh. 135(a).

⁸⁵ Steve Carraway, January 31; Markeith Holland, February 10; Hector Cardona, February 14; Robert Brian, March 10; Gregory Jones, March 10; Gerald Franz, March 10; Jose Morales, March 29; Murga Carlos, March 29; and Carlos Aguiluz (helper). GC Exh. 135(a).

⁸⁶ GC Exh. 139; L.L. Electric Exh. 4.

⁸⁷ GC Exhs 3(c), 21(c).

⁸⁸ GC Exhs. 12(b), (c), (d).

⁸⁹ GC Exh. 135(a).

⁹⁰ GC Exhs. 4(k), (l), and (m); 22(i), (j), and (k); 13(j) and (k), 171.

⁹¹ GC Exhs. 4(p), 22(n), 13(o).

It has long been held that hiring programs which exclude applicants because of their union membership are unlawful. Such programs are "inherently discriminatory" without proof of antiunion animus, because the employer "must be held to intend the very consequences which forseeably and inescapably flow from his actions." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). 93

Respondent's witnesses argued that the program was "convenient" to them, and made it possible to maintain a hiring pool without losing employees when a particular employer had no need for them. However, under the program, the borrowing employer was required to pay the wages earned by the employee at the lending employer. If they were higher than the borrowing employer's wage rate, the latter would necessarily be paying a premium for hiring through the shared man program. The borrowing employer also had to pay "all legal fringes." He did not have to pay medical expenses, or holiday and vacation expertness. However, the employee had to agree to waive holidays and vacations during the loan period. Accordingly, the only expense born by the lending employer was medical expenses—an uncertain expense compared to the known necessity of paying higher wages.

The Supreme Court has stated that in determining whether an employer's conduct is inherently discriminatory, the employer must come forward with a legitimate explanation for its conduct, and this conduct must be weighed against the consequences to the employees' rights. In this case, the disadvantage of the shared man program to union applicants was the certain loss of an opportunity to be hired. The advantage to the employers was, at best, avoidance of the "inconvenience" of laying off and rehiring employees, and, at worst, the possibility of paying a higher price for a borrowed rather than a hired employee. In cases such as the latter, the employer's willingness to pay a higher price for avoiding a "salting risk" would constitute evidence of animus. *KRI Constructors, Inc.*, 290 NLRB 802, 811 (1988).

I conclude that the certain loss of employment possibilities by union members under the shared man program is more significant than the uncertain advantages, or possibly greater expenses, of the employers, and that the program is unlawful, for the reasons given above.

3. The \$50 charge for additional applications

The evidence shows that the employers stressed recency of applications. The alleged discriminatees filed numerous applications for this reason. However, in September 1997, I.E.C. began charging \$50 for additional applications within 30 days after the first one. However, this did not apply to an employee who had been laid off by an I.E.C. employer. Since no I.E.C. employer had a contract with a Union, it is highly probable that such laid-off employees would be themselves nonunion. Accordingly, they could file frequent applications without having to pay the extra fee. This gave them an inherent advantage over

union applicants, considering the importance of recency of applications adopted by many employers. The effect of the new charge upon union applicants is shown by the abrupt diminution of applications by the alleged discriminatees after imposition of the fee.

Respondent's witnesses argued at hearing that the new charge was necessary because of the cost of the referral system. If this was true, then the cost should have been born equally by all applicants, union and nonunion alike. By allocating the alleged cost to union applicants only, and by allowing unlimited filing rights to nonunion employees, I.E.C. discriminated against the former.

I conclude that this procedure was also inherently discriminatory, since the I.E.C. must have intended the foreseeable consequences of its action. It has not given any reason whatever for the imposition of the new costs exclusively on union members.

4. I.E.C.'s refusal to supply information to the alleged discriminatees

The evidence shows that the I.E.C. refused to tell the applicants whether or to whom their applications had been transmitted. The first explanation proffered by I.E.C. director Wilkinson was that he did not know, and that I.E.C. did not keep records of this. What actually happens is that, at the end of each day, the records of 10 to 15 five-page applications are faxed to employers who have requested them. I.E.C. has presented no evidence as to the cost of maintaining a copy of these transmittals for a few days, or the expense involved. Because of the elementary methods of duplicating copies in today's technology, the time spent in making a copy of each transmittal, perhaps simultaneously with the transmittal, would not appear to be inordinate. I do not accept Wilkinson's undocumented explanation as valid. Even if he had this information, according to Wilkinson, he would not have given it to the applicants. Accordingly, I conclude, the refusal to give them this information is deliberate.

The Charging Party likens I.E.C.'s refusal to give the applicants this information to a union's obligation to give referral information to its members, and to cases which find a violation of Section 8(b)(1)(A) for failure to abide by this obligation. Since the restrictions of Section 8(a)(1) are greater than those of Section 8(b)(1)(A), the Charging Party argues, I.E.C.'s refusal to give the applicants this information must be considered a violation of Section 8(a)(1).

I.E.C.'s actions must be viewed together with the requirement of many of the Respondent employers that the applicant file an application with the I.E.C. The combination of these two policies meant that the applicant was trapped in a system where he could not find out whether his application had even been considered. One of the most startling facts in the evidence is that over 200 applications were filed by the alleged discriminatees—individuals with good credentials—over a period of about a year and three-quarters when numerous employees were being hired—and yet not one alleged discriminatee was hired.

⁹² Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974).

⁹³ See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); *Honeywell, Inc.* 318 NLRB 637 (1995).

⁹⁴ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 700 (1983).

⁹⁵ C.P. Br. 28–33, citing numerous cases to this effect.

I conclude that I.E.C.'s refusal to supply the requested information was unlawful.

5. The I.E.C.'s publications

I.E.C. publications, authorized by former Chapter and National I.E.C. President Jon Pollack, presented "strategies to combat salting," with references to I.E.C. running a hiring hall to avoid salting risks. Wilkinson stated that these were Pollock's opinions, not necessarily endorsed by the I.E.C. Other than this testimony, there were no disclaimers of the opinions by I.E.C. Considering their publication by I.E.C., and Pollock's status in the organization, I conclude that I.E.C. adopted these opinions.

Respondents argue that these statements by Pollack are protected by Section 8(c) of the Act. However, the Board has held with judicial approval that such statements may be considered as background evidence of animus where there is other evidence to support an unfair labor practice finding. There is such evidence, as described above.

6. Conclusion

As set forth above, the I.E.C.'s referral program is closely integrated with the hiring by the Respondent employers. I.E.C.'s antiunion animus is shown by its exclusion of union applicants under the shared man program, the exemption of nonunion applicants from filing fees, the refusal to give applicants information about distribution of their applications, and its published statements in effect telling its members that it had methods to avoid hiring union applicants.

I conclude that I.E.C., as alleged in the complaint, maintained a discriminatory hiring system.

IV. THE ALLEGED UNLAWFUL REFUSALS TO HIRE

A. Applicable Principles

In order to establish an unlawful refusal to hire or consider hiring an individual, the General Counsel must show an employment application by the individual, a refusal to hire or consider hiring him, a showing that the applicant was or might be expected to be a union supporter or sympathizer, that the employer knew this, that he maintained animus against such membership or sympathy, and refused to hire the applicant because of such animus. *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).

B. MH Technologies

The complaint alleges that MH Technologies refused to hire or consider hiring Lockwood, Rath, Niemeyer, Smith, and Gafford, on September 20, 1996. On that date, Gafford, Smith, and Niemeyer started working for MH Technologies on referral from a temporary staffing company. On the same date, Lockwood and Rath went to the Company, presented their business cards showing that they were union organizers and asked for employment. Company Owner Joe Heiman told them that he was not doing any hiring at that time. In fact, he hired Gafford,

Smith, and Niemeyer the same day. He also "borrowed" journeymen on October 1, 9, 15, and 16.

Gafford, Smith, and Niemeyer, who were hired on September 20, engaged in picketing and other protected activities on their own time. They were discharged on September 23, because of a city ordinance barring referral of journeymen by temporary agencies. They asked the employer for direct employment at the time, but were told to file applications at the I.E.C. They did so, and were informed by a clerical that their applications had been faxed to MH Technologies. Company Foreman John Burch said he was not aware of this. I do not credit Burch's statements.

I conclude that Lockwood and Rath applied for employment on September 20, 1996, and that their applications were denied. Gafford, Smith, and Niemeyer applied for direct employment on September 23, after being discharged as temporary employees, together with Lockwood and Rath. They complied with the MH Technologies' direction to file I.E.C. applications.

Heiman's statement to Lockwood and Rath on September 20 that he was not hiring was obviously false—he hired the other alleged discriminatees the same day. A week after the five applicants came to the office on September 23, MH Technologies borrowed a journeyman under the shared man program on October 1, and borrowed three more within the next 2 weeks. I have found above that the shared man program is unlawful. It is the first category in MH Technologies' hiring system of considering applicants for employment. Following this are current and former employees with good records, friends of current employees with good records, and, finally, I.E.C. applicants with preference given to those having a favorable reference from another I.E.C. member. MH Technologies is itself nonunion, and it is unlikely that there would be any union members or sympathizers in any of these categories. Accordingly, such priority systems of hiring unlawfully exclude union members and sympathizers.⁹⁷ As indicated, MH Technologies' asserted hiring policy stresses the importance of a "good record" before hiring an individual. In fact, as shown above, the Company hired and rehired individuals with poor records, including substance abuse. In contrast, the records of the alleged discriminatees show long histories of competent work without any unfavorable references.

In sum, the alleged discriminatees filed applications at a time when Respondent was hiring, and demonstrated their union membership or preference. The Company gave pretextual reasons for not hiring them, thus manifesting its animus toward the union sympathies of the applicants. *Pontiac Osteopathic Hos-*

⁹⁶ NLRB v. Colonial Lincoln Mercury Sales, 485 F.2d 455, 456 (5th Cir. 1973); NLRB v. Builders Supply Co. of Houston, 410 F.2d 606, 608 (5th Cir. 1969).

⁹⁷ D.S.E. Concrete Forms, 303 NLRB 890 (1991), enfd. 21 F.3d 1109 (5th Cir. 1994); Eldeco, Inc., 321 NLRB 857 (1996), denied in part but enfd. in relevant part 132 F.3d 1007 (4th Circ. 1997); M&M Electric Co., 323 NLRB 361, 370 (1997).

At the hearing, Respondent argued that I should recuse myself, since my decisions in D.S.E. Concrete Forms and Eldeco showed that I had "prejudged" the case at bar. I pointed out that no case can be judged before the facts are known. Respondent repeats the same argument in its brief, and urges me not to write a decision in the instant case. My prior decisions, as modified, have become those of the Board and the respective courts of appeal. It would be inappropriate for me to recuse myself in these circumstances.

pital, 284 NLRB 442 fn. 4 (1987). It unlawfully refused to hire or consider hiring the applicants on the dates given above.

C. Houston Stafford

The complaint alleges that, on and after January 20, 1996, Houston Stafford unlawfully refused to hire or consider hiring Troy Lockwood and Ray Rath. Rath filed an I.E.C. application on January 8, 1996, while Lockwood filed one on January 9. As was customary, both applications showed that the applicants were union organizers. On January 16, 1996, Houston Stafford's superintendent, Beasley, told I.E.C. to submit applications, and it did so. Beasley admitted receiving February applications from Lockwood and Rath, but denied receiving January applications. I have found above that the January applications were received by Houston Stafford.

The Company hired 16 journeymen from January 1, 1996, beginning with the payroll period ending January 24 through February 23. It did not hire Lockwood or Rath. The reason advanced by Beasley is that it was not hiring at the time. This is obviously false in light of the uncontroverted hiring records.

The evidence listed above shows that Houston Stafford hired individuals as journeymen when they showed limited to no experience in that work. The qualifications of Lockwood and Rath were superior to those of every one of the hired applicants listed above. The Company's preference for less-qualified employees, and its false reasons given to the applicants for its failure to hire them, demonstrate its animus against their known union sympathies. *Pontiac Osteopathic Hospital*, supra. I conclude that Houston Stafford discriminatorily refused to hire or consider hiring Rath and Lockwood during the payroll period ending January 24, 1996.

D. KenMor Electric

The complaint alleges that KenMor unlawfully refused to hire or consider hiring Troy Lockwood, Ray Rath, and John Gafford on and after January 9, 1996. Rath's first application in 1996 was filed on January 8, and Lockwood's on January 9. However, Gafford's first application was filed on February 13. I conclude above that these were received by KenMor in due course.

KenMor hired a journeyman on January 9, another on January 22, and 15 through March 12, including one each on February 6, 8, 12, and 17.

KenMor's animus against the applicants because of their union affiliation is shown by Kuhn's requirement that Lockwood sign an agreement in the 1980s that he would not engage in union activity as a condition for then obtaining employment, by his taking Lockwood's and Rath's applications to Company President Kennard in 1996, the first time he had done so, by his failure to give Gafford credit for traffic signal experience when the Company had the second highest dollar project in its history involving work of that nature, and by his disparaging Gafford's industrial experience when he hired other applicants with similar experience.

The reasons given by KenMor for failing to hire the applicants are pretextual, and manifest antiunion animus. *Pontiac Osteopathic Hospital*, supra. The asserted lack of "recency of experience is belied by the fact that numerous applicants were

hired without recent experience, as shown above. KenMor's argument that the alleged discriminatees did not have qualifications equal to those of the individuals whom it did hire is contradicted by Shane Scallan's record of reemployment and later termination, by the hiring of numerous journeymen with significantly less experience that Lockwood, Rath, and Gafford, and by the inexplicable hiring of Howland, who asserted prior sales experience with Amway.

I conclude that KenMor unlawfully failed to hire Rath and Lockwood on January 9, 1996, as alleged in the complaint, and unlawfully failed to hire or consider hiring Gafford on February 17, 1996, the Company's first hiring of a journeyman after Gafford's February 13 application.

E. Hou-Tex Power

The complaint alleges that Hou-Tex Power on February 25, 1997, unlawfully failed to hire or consider hiring, Troy Lockwood. Ray Rath, and John Gafford. Lockwood and Rath had previously applied at Hou-Tex in 1995, when they had a friendly conversation with supervisor Fred Cataldo, which did not result in employment. On February 24, 1997, they filed applications at the I.E.C. On the same date, Hou-Tex owner James Cochran asked I.E.C. for its "most recent" applications, and received 15 by fax the same day. He testified that he did not recall receiving applications from Lockwood, Rath, or Gafford. They called on him 10 days later, asked for employment, and were told to file I.E.C. applications. Although they had previously done so, they did so again, and again called Cochran for an appointment. He refused to see Lockwood and Rath, granted an interview to Gafford, but refused to hire him. I conclude that Hou-Tex did receive the applicants' February 24 applications, and, that, in any event, they personally applied 10 days later.

Cochran contended that Lockwood was not hired because he had "falsified" his 1995 application by giving a reference who, allegedly, did not know him. Lockwood disputed this. Ken-Mor did not call any of his other references. Cochran asserted that Rath had not been hired because he was "rude and obnoxious." This testimony was based upon the alleged assertions of Fred Cataldo. As indicated, I infer that Cataldo, if called by Respondent, would have testified adversely to Respondent's case.

Cochran also contended that the qualifications of Lockwood, Rath, and Gafford were not as good as those of the journeymen he did hire. This is not true in the case of John Rogers, who was hired as a journeyman, and Alfredo Elizondo, who was hired as an apprentice but was arguably a journeyman.

Cochran also borrowed journeymen under the shared man program, and paid them the wage they had earned at the lending employer, which were higher than Hou-Tex Power's wages, thus, demonstrating animus against the applicants' union affiliation.

Cochran's principle reason for not hiring the applicants was based on assertions of a missing witness, and is obviously false. His additional reasons are pretextual, as shown by the qualifications of the individuals whom he did hire, and manifest anti-union animus. *Pontiac Osteopathic Hospital*, supra.

I conclude, as alleged in the complaint, that Hou-Tex unlawfully refused to hire or consider hiring Lockwood, Rath, and Gafford on February 25, 1997.

F. H & J Electric

The complaint alleges that H & J Electric on March 25, 1997, unlawfully refused to hire or consider hiring Troy Lockwood, John Gafford, and Ray Rath.

On March 17, 1997, H & J called I.E.C. for applications going back 2 or 3 days. Lockwood, Rath, and Gafford filed applications the same date. Project Manager Lance Jones testified that he received 7 or 8 applications from the I.E.C., including one from Rath, and, he believed, one from Gafford, although he did not recall receiving one from Lockwood. I have found above that he received all three applications with the batch sent over by I.E.C.

Lance Jones testified that he wanted journeymen with cable tray and rigid pipe experience. I credit the testimony of Lockwood, Gafford and Rath that an experienced journeyman would have these qualifications. After hiring one of the I.E.C. applicants (Hebert), Jones turned to a temporary staffing service, and hired eight temporary journeymen without knowing their credentials. Two of them he had to send back as unqualified. It would have been cheaper for H & J to have hired its own employees.

Rath had previously worked for H & J in 1982 as an apprentice. Accordingly, he was a former employee, and fell into one of the Company's hiring categories. In fact, he worked with Lance Jones as an apprentice. It is odd that Jones did not at least interview Rath, and inquire further about his expertise. Instead, Jones hired temporary journeymen without knowing their credentials, at a higher cost than the Company's wage rate. These facts invalidate Jones' asserted requirement that the applicants list rigid pipe and cable tray experience. I reject that explanation as pretextual, and a manifestation of antiunion animus. H & J took into account the fact that the applications of Lockwood, Rath, and Gafford showed that they were union organizers, and the Company refused to hire or consider hiring them on March 25, 1997, for this reason.

G. L.L. Electric

The complaint alleges that beginning January 1, 1997, L.L. Electric unlawfully refused to hire or consider hiring Troy Lockwood, John Gafford, and Ray Rath. Gafford filed I.E.C. applications on February 12, 13, and 14, 1997, while Lockwood and Rath filed on February 13. L.L. Electric's president Louis Lee hires by going to the I.E.C. and examining the applications. L.L. Electric hired Mike Walling on February 14, as an apprentice, but paid him a journeyman's wage, the highest paid by the Company. L.L. Electric hired Jeff Walt on March 20, and paid him a journeyman's wage rate. Lockwood, Rath, and Gafford filed applications on March 18, 19, and 20. L.L. Electric hired John Rogers as a journeyman on March 31, the same date that Lockwood, Rath, and Gafford filed applications. Lee also hired numerous apprentices on February 14, March 10 and 29. It is highly unlikely that Lee did not see the applications of Lockwood, Rath and Gafford. He vocally admitted seeing something from them and I find above that Lee in fact did see the applications of the alleged discriminatees.

L.L. Electric's only defense, thus, comes down to a partial denial that it saw the alleged discriminatees' applications. Since this explanation is untrue, it must be concluded that it is pretextual, and manifests anti union animus. Inasmuch as the applications showed that the applicants were union organizers, and the Company has given a pretextual reason for not hiring them, I conclude that it unlawfully refused to hire or consider hiring them on February 14, 1997, when the Company hired Mike Walling.

In accordance with my findings above, I make the following.

CONCLUSIONS OF LAW

- 1. Houston Stafford Electric, Inc., KenMor Electric Company, Inc., Hou-Tex Power, Inc., MH Technologies, Inc., H & J Electric Co., Louis P. Lee d/b/a L.L. Electric Co., and Independent Electrical Contractors of Houston, Inc. (I.E.C.) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. International Brotherhood of Electrical Workers Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL—CIO is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Since January 1996, Independent Electrical Contractors of Houston, Inc., has maintained a discriminatory referral system in that its referral of employment applications to its member employers includes refusal to tell applicants the employers to whom their applications have been referred, maintenance of a shared man program which effects transfers of employees among members, but precludes employment of union members or sympathizers, a charge of \$50 for filing additional applications within 30 days, but exempting from the charge employees laid off by I.E.C.'s nonunion members, all in violation of Section 8(a)(3) and (1) of the Act.
- 4. On the dates set forth below, and continuing thereafter, the designated Respondent refused to hire or consider hiring the indicated applicants for employment because of their union membership or sympathies, or other protected activities, in violation of Section 8a(3) and (1) of the Act:
 - (a) KenMor Electric Company:

January 9, 1996 Troy Lockwood Ray Rath

February 17, 1996 John Gafford

(b) Houston Stafford Electric, Inc.:

January 24, 1996 Troy Lockwood Ray Rath

(c) MH Technologies, Inc.:

September 20, 1996 Troy Lockwood Ray Rath

September 23, 1996 Doug Niemeyer

Jack Smith John Gafford

(d) Hou-Tex Power, Inc.:

February 25, 1997 Troy Lockwood

Ray Rath John Gafford

(e) Louis P. Lee d/b/a L.L. Electric Co.:

February 14, 1997 Troy Lockwood

Ray Rath John Gafford

(f) H & J Electric Co.:

March 25, 1997 Troy

Troy Lockwood Ray Rath John Gafford

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondents have committed unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and engage in certain affirmative action necessary to effectuate the policies of the Act.

The typical remedies provided by the Board include offers of reinstatement or employment to the discriminatees, and make—whole remedies. Because of the multiplicity of respondents, and the different dates on which they committed unfair labor practices, this case requires a departure from the Board's normal remedial measures. I shall recommend that all respondents who unlawfully refused to hire a discriminatee be required to offer employment to him, and make him whole taking into account the wage rate at that time of the employer, deducting, as usual, net interim earnings. If that employer makes an offer of employment which meets the Board's standards, and it is not accepted, that employer's liability will cease except for accrued backpay.

Each employer shall be responsible for backpay in an amount which is proportionate to the number of employers then obligated to pay backpay. Thus, the second employer will be responsible to make an offer of employment, and bear the proportionate amount of backpay obligations—in this case 50 percent. If the wage rate of the second employer exceeds that of the first employer, he shall pay the entirety of the additional backpay caused by such excess, plus his proportional share of the original amount. If the second employer's wage rate is less than that of the first employer, resulting in a smaller backpay amount, the difference between this lesser amount and the original amount shall be deducted from the amount due from the second employer, and added to the amount due from the first employer, so that the backpay amount remains the same.

The same principles will apply with each succeeding employer. Thus, the proportional amount when a third employer is involved will be one-third, and so on.

If any employer makes an offer of employment at a time when the backpay and salary due from another employer would be greater, the discriminatee may reject said offer without sacrificing his right to backpay, although the employer making the offer will be released from liability except for accrued backpay then due.

The net amount due the discriminatee shall be paid in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*. 98

I shall further recommend a broad order, as Respondents' egregious misconduct demonstrates a general disregard for employees' statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁹⁹

ORDER

Independent Electrical Contractors of Houston, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Maintaining a discriminatory referral system, in which its referrals of applications to its member employers includes refusal to tell the applicants the identities of the employers to whom their applications have been referred.
- (b) Maintaining a shared man program which excludes union members or sympathizers.
- (c) Charging fees for additional applications from which fees laid-off employees of employer members are exempt.
- (d) In any other manner interfering with, restraining, or coercing applicants for employment in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11,
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Houston Stafford Electric, Inc., KenMor Electric Company, Inc., Hou-Tex Power, Inc., MH Technologies, Inc., H & J Elec-

ment to 26 U.S.C. §6621. Interest accrued before January 1, 1987, (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651.

⁹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

100 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁹⁸ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1985 amend-

tric Co., and Louis P. Lee d/b/a L.L. Electric Co., their officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discouraging membership in International Brotherhood of Electrical Workers, Local Union 716 a/w International Brotherhood of Electrical Workers, Local 716, International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization, by refusing to hire or consider hiring applicants for employment because of their union membership or sympathies, or other protected activities, or by discriminating against them in any other manner.
- (b) In any other manner interfering with, restraining, or coercing applicants for employment in the exercise of their Section 7 rights.
- 2. Take the following affirmative action necessary to effectuate the purposes of the Act.
- (a) Within 14 days from the date of this Order, offer employment as journeymen to the applicants against whom it discriminated, as listed in the conclusions of law in this decision.
- (b) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and make the discriminatees whole in the manner prescribed by the Board within 14 days.
- (c) Within 14 days after service by the Region, post at its Houston, Texas facilities, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representatives, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date it has herein been found to have violated the Act.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.¹⁰²

Dated, Washington, D.C.

APPENDIX A

NOTICE TO EMPLOYEES

- ¹⁰¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."
- ¹⁰² The General Counsel's, Respondent MH Technologies', and Respondent H & J Electric Company's unopposed motion to correct the transcript, copies attached, are granted.

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these concerted activities

WE WILL NOT maintain a discriminatory referral system, in which referrals of applications to our member employers includes refusal to tell the applicants the identities of the employers to whom their applications have been referred.

WE WILL NOT maintain a shared man program which excludes Union members or sympathizers.

WE WILL NOT charge fees for additional applications from which fees laid-off employees of employer members are exempt.

WE WILL NOT in any other manner interfere with, restrain, or coerce applicants for employment in the exercise of their Section 7 rights.

INDEPENDENT CONTRACTORS OF HOUSTON, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these concerted activities

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Local Union 716 a/w International Brotherhood of Electrical Workers, Local 716, International Brotherhood of Electrical Workers, AFL—CIO, or any other labor organization, by refusing to hire or consider hiring applicants for employment because of their union membership or sympathies, or other protected activities, or by discriminating against them in any other manner.

WE WILL NOT in any other manner interfere with, restrain or coerce applicants for employment in the exercise of their Section 7 rights.

WE WILL within 14 days from the date of this Order, offer employment as journeymen to the applicants against whom we have discriminated.

WE WILL preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and WE WILL make whole, with interest, the applicants against whom we have discriminated

HOUSTON STAFFORD ELECTRIC, INC., AND KENMOR ELECTRIC COMPANY, INC., AND HOU-TEX POWER, INC., AND MH TECHNOLOGIES, INC., AND H & J ELECTRIC CO., AND LOUIS P. LEE D/B/A L.L. ELECTRIC CO.

Nadine Littles, Esq., for the General Counsel.

Frank Carrabba, Esq., Tom M. Davis Jr., Esq. and Judith Batson Sadler, Esq., of Houston, Texas, for the Respondent.

Patrick Flynn, Esq., of Houston, Texas, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. This is a Supplemental Decision in the above-captioned proceeding. On May 11, 2000, the Board issued its Decision in *FES*, 331 NLRB 9. Thereafter, the Board issued an Order Remanding the above-captioned proceeding to me for consideration in light of its decision in *FES*. The parties submitted responses to an Order to Show Cause which I have carefully considered together with the record in this proceeding.

I. THE ELEMENTS OF AN UNLAWFUL REFUSAL TO HIRE

The General Counsel must establish that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct.

The General Counsel can establish a discriminatory refusal to hire even when no hiring takes place. If the employer had plans to hire and then did not do so in order to avoid hiring union applicants, there is a discriminatory refusal to hire.¹

The General Counsel must also show that the applicants had experience or training relevant to the announced or generally known requirements for the positions being filled or that the requirements were themselves pretextural.

The General Counsel must also show that antiunion animus contributed to the decision not to hire the applicants.

Once this is established the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity. If the Respondent asserts that the applicants were not qualified for the position it was filling it is the burden of the Respondent to show at the hearing on the merits that they did not possess the qualifications that the position required, or that others who were hired had superior qualifications and that it would not have hired them for that reason in the absence of their union membership or affiliation. If the General Counsel meets his burden and the Respondent fails to show that it would have made the same hiring decisions even in the absence of union membership or affiliation then a violation of Section 8(a)(3) has been established.

The remedy for such a violation is a cease-and-desist order and an offer of immediate instatement to the positions for which they applied or if no such positions exist to substantially equivalent positions.² Respondent must also provide an adequate remedy for its unfair labor practices.

II. REVIEW OF THE REMANDED PROCEEDING

Review of the Remanded proceeding shows that all of the requirements of *FES* have been met. Accordingly, I affirm my prior factual findings, conclusions of law and recommended order.

Dated Washington, D.C.

¹ FES, supra, p. 4, and fn. 7.

² Ibid.